Ismail bin Hashim v Inno Concrete Technologies Sdn Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCvC-135–10 OF 2018
SU TIANG JOO JC
24 JUNE 2021

Contract — Employment contract — Contract of service and contract for service — Parties entered into transport agreements — Defendants sold mixer-trucks to plaintiff — Plaintiff delivered ready-mixed concrete to defendants' customers — Income earned by plaintiff in making deliveries deducted by defendants as payment for mixer-trucks — Whether plaintiff was employee of second defendant or independent contractor — Whether transport agreements were contract of service or contract for service — Whether transport agreements were fraudulent, unlawful and void — Whether defence of non est factum applicable — Whether imposition of goods and services tax on plaintiff was illegal — Whether second defendant obliged to refund payment of purchase price of mixer-truck to plaintiff — Whether plaintiff signature in transport agreement was forged by first defendant — Whether court ought to draw adverse inference against defendants for failure to lodge police report to rebut plaintiff's police report on forgery of signature — Whether plaintiff was estopped from pursuing his claims — Contracts Act 1950 ss 17 & 63 — Evidence Act 1950 ss 73A(3), 74, 75, 76, 77, 78, 78A & 114(g) — Goods and Services Tax Act 2014 s 56(3)(b)

The first defendant ('D1') and the second defendant ('D2') were involved in the business of producing and selling ready-mixed concrete ('RmC') whereas the plaintiff had a registered business under the name of Usaha Kati Enterprise. The plaintiff and the defendants had entered into three transport agreements dated 27 February 2010 ('the first agreement'), 8 October 2013 ('the second agreement') and 25 April 2016 ('the third agreement') whereby under these agreements, D1 sold mixer-trucks with registration numbers WEF 5801 and WYX 9397 to the plaintiff to be used by the plaintiff as transportations to deliver the RmC to D1's customers and the income earned in making the deliveries were deducted by D1 as payment for the said mixer-trucks. The agreements were terminated by the defendants when the plaintiff assaulted a female staff of the defendants. In the present case, the plaintiff argued that the defendants had used the agreements to trap him into being enslaved as a workman for the period from 27 February 2010 until 26 October 2016 and that the relationship between him and D2 for the said period was one of master and servant ie he was in a contract of service and not contract for service. The issues raised in the present action were: (a) whether the plaintiff was an employee of D2 and tied up with this issue was whether the first agreement and

second agreement were fraudulent, unlawful and void as to make out the plaintiff's claim of tort of conspiracy against D1 and D2 as to entitle him to special, general, aggravated and exemplary damages — in relation to this issue, the plaintiff raised the defence of non est factum by submitting that he had been deliberately prevented from understanding the first agreement and the second agreement ('the two agreements') because the two agreements were in English; (b) whether the imposition of 6% GST on the fuel purchased by the plaintiff, the costs of fixing a Global Positioning System ('GPS') each on the mixer-trucks, monthly charges for the GPS, vehicle inspection charges by Jabatan Pengangkutan Jalan ('JPJ') was fraudulent amounting to cheating and in contravention of the Goods and Services Tax Act 2014 ('the GST Act'); (c) whether D2 was obliged to refund a sum of RM101,166.56 for the price of the mixer-truck with registration number WYX 9397 which he had paid to D1 through D2; (d) whether the plaintiff's signature on the third agreement had been forged by D1 — in relation to this issue, the plaintiff had urged the court to draw adverse inference pursuant to s 114(g) of the Evidence Act 1950 ('the EA') against the defendants for the defendants' failure to file a police report to rebut the plaintiff's police report alleging forgery of signature; and (e) whether the plaintiff was estopped from pursuing his claims.

Held, dismissing the plaintiff's claims with costs:

(1) Based on the oral and documentary evidence, the court found that the plaintiff was an independent contractor and not a workman. By applying the 'Entrepreneur Test', the plaintiff was 'carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior'. The court had also applied the 'Integral Test' and found that the plaintiff's work was not integrated in the defendants' organisation but only accessory to it. Further, the plaintiff's claim of being a workman under a contract of service was an afterthought because this claim only arose for the first time in the present action. The court accepted the clear and unshaken evidence of the defendants' director ('SD5') that D2 provided work to the plaintiff as an independent contractor. In addition, cl 6.1 of each of the agreements expressly provided that the plaintiff was an independent contractor. The plaintiff himself had also admitted on more than one occasion not only orally but in writing that he was an independent mixer-truck contractor and this admission, being the strongest evidence possible, put it beyond a doubt that as a matter of fact, the plaintiff was independent contractor (see para 33).

(2) Having held that the plaintiff was not a workman but an independent contractor and what the plaintiff had entered was a business relationship through his business entity of Usaha Kati Enterprise, a business relationship which he was happy with until he was terminated by reason of his misconduct, the claim for the tort of conspiracy to defraud premised upon the agreements fell flat (see para 35).

(3) The court found that the non est factum rule did not apply in favour of the plaintiff for the following reasons: (a) the plaintiff had resiled from challenging both the first agreement and second agreement which were in English; (b) in the letters of termination, the plaintiff had referred to the two agreements and sought to be released of the same and had sought for consent to dispose of the mixer-trucks, which meant that he understood what arrangement he had entered with the defendants; (c) during the inquiry into his misconduct, the plaintiff said that he had been with the defendants since 2007, that he was happy and no issue was taken that he was kept out of any agreements which meant that his unhappiness was only because the business arrangements were terminated; (d) the plaintiff was no hillbilly but one who was able to manage two-mixer trucks carrying the RmC interstate, whenever necessary, and the accounts of his business; and (e) the court accepted the evidence of the general manager of the defendants and SD5 that the contents of the two agreements were in fact explained to the plaintiff in Bahasa Malaysia before they were signed and copies given to the plaintiff on the day of the execution (see para 43).

(4) In relation to the allegation of fraud, no attempt whatsoever was made by learned counsel for the plaintiff to at least refer to the provisions of s 17 of the Contracts Act 1950 ('the CA') and to show how the plaintiff had been defrauded (see para 50).

(5) On the issue of forgery of signature, the court did not agree with the plaintiff that just because there had been no police report lodged in rebuttal, an adverse inference was to be drawn and the statements contained in the plaintiff's police report were to be accepted as true. It was not a substantive piece of evidence. Further, s 73A(3) of the EA would prohibit the admissibility of the police report as it was a statement made by the plaintiff who undoubtedly was a person interested at a time when proceedings were pending involving a dispute as to whether his signature had been forged on the third agreement. However, in the present case, premised on the defendants' agreement for the police report to be accepted and the provisions of ss 74 to 78A of the EA which provided that public document was admissible, the court ruled that the police report was admissible. Nevertheless, the probative value of the said evidence was for the court to decide at the end of the day (see paras 58, 60 & 66–68).

(6) Based on the evidence, the materials before the court and the case authorities, the court found that the plaintiff had admitted that it was his signature and, in any event, even if there was no such admission, he had failed to prove that the signature was forged. His belated attempt to say he was uncertain about the evidence or admission he had given lacked any

credibility. The plaintiff's submission that his signature on the third agreement was a forgery was therefore devoid of merits (see para 74).

(7) In respect of the plaintiff's submission that D1 did not have the right to sell the mixer-truck with registration number WEF 5801 to the plaintiff as it was registered under MSE Construction Sdn Bhd, there was evidence from SD5 that D1 had bought the said truck from Winshire Corp, who in turn had purchased it from another entity named MSE Construction. What was important was that D1 was in a position to give good title to the plaintiff once the plaintiff had affected full payment. Further, based on the evidence, the plaintiff had no issue in seeking the permission of D1 to sell the said truck and to have his other mixer-truck WYX 9397 transferred (see para 80).

(8) The plaintiff's claim that the 6% GST was unlawfully imposed on him was a red herring. If the plaintiff had purchased diesel from any of the petrol stations directly, he would not have to pay any GST because petrol stations were exempted under s 56(3)(b) of the GST Act. However, the plaintiff chose to use the defendants' companies Shell credit card to purchase fuel which saw GST being imposed. The plaintiff was also advised that he could go over to the Royal Customs Department to claim back his GST but no evidence was led or proffered as to why he did not. To then lay this claim upon the defendants was wholly devoid of merits. For the 6% GST levied for the use of the GPS monitor on the mixer-trucks, there was no complaint raised throughout the plaintiff's business relationship with the defendants and to only raise it in the present action constituted a clear afterthought. In any event, during cross-examination, the plaintiff admitted that it was a requirement by Suruhanjaya Pengangkutan Awam Darat that such an apparatus had to be affixed to the vehicles (see paras 82–85).

(9) Having held that the plaintiff was not engaged under a contract of service but one of contract for services, the expenses incurred by the defendants for the benefit of the plaintiff could rightfully be deducted against the earnings of the plaintiff. In the circumstances, the plaintiff's claim to be reimbursed for the deductions was devoid of merits, more so, when these deductions which had been regularly done in the past years since the first agreement were only sought to be challenged for the first time by way of the present action, after the contracts for his services were terminated in 2016. Therefore, the assertions by the defendants that the plaintiff would in the circumstances be estopped from challenging such deductions were well founded (see paras 87–88).

(10) In relation to issue (c), in both the defendants' primary written submissions and submissions in reply, the defendants submitted that at the request of the plaintiff made in writing the second agreement was transferred to Mohd Hasrul bin Mohd Sapuan ('SD4'). Pursuant to s 63

of the CA, the legal effect of that was that the said agreement need not be performed. Thus, the plaintiff had waived whatever rights he had and whatever rights, if any, he might have should lie against SD4 (see paras 93–94 & 97).

(11) Considering that the plaintiff had secured the full benefit under the first agreement regarding vehicle WEF 5801 coupled with the waiver he had executed in writing and with the second agreement regarding WYX 9397 had been novated in favour of his nominated party at his request, the court held that the plaintiff was estopped from claiming for whatever rights, if any, that still may be under the two agreements (see para 102).

[Bahasa Malaysia summary

Defendan pertama ('D1') dan defendan kedua ('D2') terlibat dalam perniagaan pengeluaran dan penjualan konkrit segera ('RmC') manakala plaintif mempunyai perniagaan berdaftar di bawah nama Usaha Kati Enterprise. Plaintif dan defendan-defendan telah menandatangani tiga perjanjian pengangkutan bertarikh 27 Februari 2010 ('perjanjian pertama'), 8 Oktober 2013 ('perjanjian kedua') dan 25 April 2016 ('perjanjian ketiga') di mana di bawah perjanjian-perjanjian ini, D1 menjual lori-lori pembancuh dengan nombor pendaftaran WEF 5801 dan WYX 9397 kepada plaintif untuk digunakan oleh plaintif sebagai pengangkutan menghantar RmC kepada pelanggan D1 dan pendapatan yang diperoleh dalam membuat penghantaran tersebut ditolak oleh D1 sebagai bayaran untuk lori-lori pembancuh tersebut. Perjanjian-perjanjian tersebut telah ditamatkan oleh defendan-defendan apabila plaintif menyerang seorang kakitangan wanita defendan-defendan. Dalam kes ini, plaintif berhujah bahawa defendan-defendan telah menggunakan perjanjian-perjanjian tersebut untuk memerangkapnya untuk diperhambakan sebagai pekerja untuk tempoh dari 27 Februari 2010 hingga 26 Oktober 2016 dan bahawa hubungan antara dia dan D2 bagi tempoh tersebut adalah majikan dan pekerja iaitu dia berada dalam kontrak perkhidmatan dan bukan kontrak untuk perkhidmatan. Isu-isu yang dibangkitkan dalam tindakan ini adalah: (a) sama ada plaintif adalah pekerja D2 dan terikat dengan isu ini adalah sama ada perjanjian pertama dan perjanjian kedua adalah penipuan, menyalahi undang-undang dan tidak sah yang membuktikan tuntutan plaintif bagi tort konspirasi terhadap D1 dan D2 untuk melayakkannya mendapat ganti rugi khas, am, teruk dan teladan — berhubung isu ini, plaintif membangkitkan pembelaan non est factum dengan berhujah bahawa dia telah sengaja dihalang daripada memahami perjanjian pertama dan perjanjian kedua ('kedua-dua perjanjian tersebut') kerana kedua-dua perjanjian tersebut dalam Bahasa Inggeris; (b) sama ada pengenaan 6% GST ke atas bahan api yang dibeli oleh plaintif, kos untuk menetapkan Sistem Kedudukan Global ('GPS') setiap satu pada trak pembancuh, caj bulanan untuk GPS, caj pemeriksaan kenderaan oleh Jabatan Pengangkutan Jalan ('JPJ') berunsur fraud yang membawa kepada penipuan dan melanggar

Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST'); (c) sama ada D2 berkewajipan membayar balik sejumlah RM101,166.56 untuk harga trak pembancuh bernombor pendaftaran WYX 9397 yang telah dibayarnya kepada D1 melalui D2; (d) sama ada tandatangan plaintif pada perjanjian ketiga telah dipalsukan oleh D1 — berhubung dengan isu ini, plaintif telah menggesa mahkamah membuat inferens bertentangan menurut s 114(g) Akta Keterangan 1950 ('AK') terhadap defendan-defendan kerana kegagalan defendan-defendan memfailkan laporan polis untuk menyangkal laporan polis plaintif yang mendakwa pemalsuan tandatangan; dan (e) sama ada plaintif terhalang daripada meneruskan tuntutannya.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Berdasarkan keterangan lisan dan dokumentari, mahkamah mendapati plaintif adalah kontraktor bebas dan bukan pekerja. Dengan menggunakan 'Entrepreneur Test', plaintif 'menjalankan perniagaan, dalam erti kata menjalankannya untuk dirinya sendiri atau bagi pihaknya sendiri dan bukan semata-mata untuk pihak atasan'. Mahkamah juga telah menggunakan 'Integral Test' dan mendapati bahawa kerja plaintif tidak disepadukan dalam organisasi defendan-defendan tetapi hanya aksesori kepadanya. Selanjutnya, tuntutan plaintif bahawa plaintif adalah seorang pekerja di bawah kontrak perkhidmatan adalah pemikiran terkemudian kerana tuntutan ini hanya timbul buat kali pertama dalam tindakan semasa. Mahkamah menerima keterangan yang jelas dan tidak goyah daripada pengarah defendan-defendan ('SD5') bahawa D2 memberikan kerja kepada plaintif sebagai kontraktor bebas. Di samping itu, klausa 6.1 daripada setiap perjanjian tersebut dengan jelas memperuntukkan bahawa plaintif adalah kontraktor bebas. Plaintif sendiri juga telah mengakui lebih daripada satu kali bukan sahaja secara lisan malahan secara bertulis bahawa dia adalah kontraktor bebas trak pembancuh dan pengakuan ini, sebagai keterangan yang paling kukuh, membuktikan melampaui keraguan bahawa pada hakikatnya, plaintif adalah kontraktor bebas (lihat perenggan 33).

(2) Setelah memutuskan bahawa plaintif bukanlah seorang pekerja tetapi kontraktor bebas dan apa yang telah dimasuki oleh plaintif ialah hubungan perniagaan melalui entiti perniagaannya iaitu Usaha Kati Enterprise, hubungan perniagaan yang disukainya sehinggalah dia ditamatkan perkhidmatan disebabkan oleh salah laku, maka tuntutan untuk tort konspirasi untuk menipu berdasarkan perjanjian-perjanjian tersebut telah gagal (lihat perenggan 35).

(3) Mahkamah mendapati bahawa peraturan non est factum tidak terpakai terhadap plaintif atas sebab-sebab berikut: (a) plaintif telah menarik semula cabaran ke atas kedua-dua perjanjian pertama dan perjanjian kedua yang mana kedua-duanya dalam Bahasa Inggeris; (b) dalam

surat-surat penamatan, plaintif telah merujuk kepada kedua-dua perjanjian tersebut dan memohon untuk dilepaskan daripada perjanjian yang sama dan telah meminta persetujuan untuk melupuskan trak pembancuh tersebut, yang bermaksud bahawa dia memahami perjanjian yang telah dimasuki dengan defendan-defendan; (c) semasa siasatan ke atas salah lakunya, plaintif berkata bahawa dia telah bersama defendan-defendan sejak 2007, bahawa dia gembira dan tiada isu yang dibangkitkan bahawa dia diketepikan daripada apa-apa perjanjian yang bermaksud bahawa ketidakpuasan hatinya hanya kerana perjanjian perniagaan tersebut telah ditamatkan; (d) plaintif bukanlah seorang yang lurus bendul tetapi seorang yang mampu menguruskan dua trak pembancuh yang membawa RmC antara negeri bila diperlukan, dan mampu menguruskan akaun perniagaannya; dan (e) mahkamah menerima keterangan pengurus besar defendan dan SD5 bahawa kandungan kedua-dua perjanjian tersebut sebenarnya telah dijelaskan kepada plaintif dalam Bahasa Malaysia sebelum ia ditandatangani dan salinan diberikan kepada plaintif pada hari pelaksanaannya (lihat perenggan 43).

(4) Berhubung dengan dakwaan penipuan, tiada apa-apa percubaan dibuat oleh peguam terpelajar bagi pihak plaintif untuk sekurang-kurangnya merujuk kepada peruntukan s 17 Akta Kontrak 1950 ('AK') dan untuk menunjukkan bagaimana plaintif telah ditipu (lihat perenggan 50).

(5) Mengenai isu pemalsuan tandatangan, mahkamah tidak bersetuju dengan plaintif bahawa hanya kerana tidak ada laporan polis yang dibuat sebagai penyangkalan, inferens bertentangan perlu dibuat dan kenyataan yang terkandung dalam laporan polis plaintif perlu diterima sebagai benar. Ia bukan keterangan yang substantif. Selanjutnya, s 73A(3) AK melarang penerimaan laporan polis tersebut kerana ia adalah kenyataan yang dibuat oleh plaintif yang sudah pasti adalah orang yang berkepentingan pada masa prosiding masih berjalan melibatkan pertikaian sama ada tandatangannya telah dipalsukan pada perjanjian ketiga. Bagaimanapun, dalam kes ini, berdasarkan persetujuan defendan-defendan supaya laporan polis tersebut diterima dan peruntukan ss 74–78A AK yang memperuntukkan bahawa dokumen awam boleh diterima, mahkamah memutuskan bahawa laporan polis tersebut boleh diterima. Namun begitu, nilai probatif keterangan tersebut perlu diputuskan oleh mahkamah pada akhir kes (lihat perenggan 58, 60 & 66–68).

(6) Berdasarkan keterangan, material-material di hadapan mahkamah dan autoriti-autoriti kes, mahkamah mendapati bahawa plaintif telah mengakui bahawa tandatangan tersebut adalah tandatangannya dan, dalam apa jua keadaan, walaupun tiada pengakuan sedemikian, dia telah gagal membuktikan bahawa tandatangan tersebut dipalsukan.

Percubaannya yang agak lewat untuk mengatakan dia tidak pasti tentang keterangan atau pengakuan yang dia berikan tidak mempunyai kredibiliti. Oleh itu, hujahan plaintif bahawa tandatangannya pada perjanjian ketiga adalah palsu adalah tidak bermerit (lihat perenggan 74).

(7) Berkenaan dengan hujahan plaintif bahawa D1 tidak mempunyai hak untuk menjual trak pembancuh bernombor pendaftaran WEF 5801 kepada plaintif kerana ia didaftarkan di bawah MSE Construction Sdn Bhd, terdapat keterangan daripada SD5 bahawa D1 telah membeli trak tersebut dari Winshire Corp yang telah membelinya daripada entiti lain bernama MSE Construction. Apa yang penting ialah D1 berada dalam kedudukan untuk memberikan hak milik yang sempurna kepada plaintif apabila plaintif telah menjelaskan pembayaran penuh. Selanjutnya, berdasarkan keterangan, plaintif tidak mempunyai masalah dalam mendapatkan kebenaran D1 untuk menjual trak tersebut dan memindahkan trak pembancuhnya yang lain bernombor WYX 9397 (lihat perenggan 80).

(8) Dakwaan plaintif bahawa 6% GST telah dikenakan secara tidak sah ke atasnya adalah mengelirukan. Jika plaintif telah membeli diesel daripada mana-mana stesen minyak secara terus, dia tidak perlu membayar apa-apa GST kerana stesen minyak dikecualikan di bawah s 56(3)(b) Akta GST. Bagaimanapun, plaintif memilih untuk menggunakan kad kredit Shell syarikat defendan-defendan untuk membeli bahan api yang menyaksikan GST dikenakan. Plaintif juga dinasihatkan bahawa dia boleh pergi ke Jabatan Kastam Diraja Malaysia untuk menuntut balik GST yang dibayarnya tetapi tiada keterangan diutarakan atau dikemukakan tentang mengapa dia tidak berbuat demikian. Untuk kemudiannya membuat tuntutan ini terhadap defendan-defendan adalah tidak mempunyai merit sama sekali. Bagi 6% GST yang dikenakan untuk penggunaan monitor GPS pada trak pembancuh, tidak ada aduan yang dibangkitkan sepanjang hubungan perniagaan plaintif dengan defendan-defendan dan hanya membangkitkannya di dalam tindakan semasa terjumlah kepada pemikiran terkemudian yang jelas. Dalam apa jua keadaan, semasa pemeriksaan balas, plaintif mengakui bahawa adalah menjadi keperluan Suruhanjaya Pengangkutan Awam Darat bahawa komponen sedemikian perlu dipasang pada kenderaan tersebut (lihat perenggan 82–85).

(9) Setelah memutuskan bahawa plaintif tidak terlibat di bawah kontrak perkhidmatan tetapi kontrak untuk perkhidmatan, perbelanjaan yang ditanggung oleh defendan-defendan untuk kepentingan plaintif sewajarnya boleh ditolak daripada pendapatan plaintif. Dalam keadaan tersebut, tuntutan plaintif untuk dibayar balik pemotongan tersebut tidak bermerit, lebih-lebih lagi, apabila pemotongan ini yang telah kerap dilakukan pada tahun-tahun sebelumnya semenjak perjanjian pertama

dimasuki hanya dipersoalkan buat kali pertama melalui tindakan semasa, selepas kontrak untuk perkhidmatannya ditamatkan pada tahun 2016. Oleh itu, dakwaan defendan-defendan bahawa dalam keadaan tersebut plaintif terhalang daripada mempersoalkan pemotongan tersebut adalah berasas (lihat perenggan 87–88).

(10) Berkenaan dengan isu (c), dalam kedua-dua hujahan bertulis utama defendan-defendan dan jawapan kepada hujahan, defendan-defendan berhujah bahawa atas permintaan plaintif yang dibuat secara bertulis perjanjian kedua telah dipindahkan kepada Mohd Hasrul bin Mohd Sapuan ('SD4'). Menurut s 63 Akta Kontrak, kesan undang-undang daripada keadaan tersebut ialah perjanjian tersebut tidak perlu dilaksanakan. Oleh itu, plaintif telah mengenepikan apa-apa hak yang dia ada dan apa-apa hak, jika ada, harus ditujukan terhadap SD4 (lihat perenggan 93–94 & 97).

(11) Memandangkan plaintif telah memperoleh manfaat penuh di bawah perjanjian pertama mengenai kenderaan WEF 5801 ditambah dengan penepian yang telah dibuat secara bertulis dan dengan perjanjian kedua mengenai WYX 9397 telah dipindahkan kepada pihak yang dicalonkannya atas permintaannya, mahkamah memutuskan bahawa plaintif telah dihalang daripada menuntut apa-apa hak, jika ada, yang mungkin masih ada di bawah kedua-dua perjanjian tersebut (lihat perenggan 102).]

Cases referred to

AWC Bhd (formerly known as AWC Facility Solutions Bhd) v Point-Euro (M) Sdn Bhd [2012] MLJU 474, HC (refd)

Abu Bakar Ismail & Anor v Ismail Husin & Ors & other Appeals [2007] 3 CLJ 97, CA (refd)

Balachandran v Public Prosecutor [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Bank Voor Handel En Scheepraart NV v Slatford [1953] 1 QB 248, QBD (refd)

Bank Kerjasama Rakyat Malaysia Bhd v Chong Voon Chung [2021] MLJU 359; [2021] 1 LNS 250, CA (folld)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (refd)

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A *Employees Provident Fund Board v MS Ally & Co Ltd* [1975] 2 MLJ 89, FC (refd)
Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & 2 Ors [1994] 1 MLJ 740; [1993] 1 LNS 103; [1993] 2 AMR 51, HC (refd)
Floral Trends Limited v Li Onn Floral Enterprise (M) Sdn Bhd and Anor [2006] MLJU 339; [2006] 6 CLJ 525, HC (refd)
B *Gallie v Lee* [1969] 2 WLR 901, CA (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (folld)
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C *Lim Peng Hock & Anor v Chuah Peng San & Anor* [2021] MLJU 192; [2021] 1 LNS 119, CA (refd)
Market Investigations Ltd v Minister of Social Security [1969] 2 WLR 732, QBD (folld)
D *Mary Colete John v South East Asia Insurance Bhd* [2010] 6 MLJ 733, FC (refd)
Merck Sharp & Dohme Group & Anor v Hovid Bhd [2019] MLJU 918; [2019] 9 CLJ 1, FC (refd)
Mohd Sabri bin Mohamad Zin v Dr M Nachiappan & Anor [2017] MLJU 2443, HC (refd)
E *Montreal Locomotive Works Ltd v Montreal and A-G for Canada* [1947] 1 DLR 161, PC (refd)
Ng Kim Fong v Menang Corporation (M) Berhad [2020] MLJU 644; [2020] 1 LNS 1263, CA (refd)
F *Nor Azlina bte Abdul Aziz v Aminah bte Omar @ Minah bte Omar* [1997] MLJU 308; [1998] 2 CLJ 527, HC (refd)
Pang Mun Chung v Cheong Huey Charn [2018] 4 MLJ 594; [2018] 8 CLJ 663, CA (refd)
Rabiah bt Ani v Samsi bin Hj Hasim (t/a Syarikat Perniagaan Jaya) & Anor [2011] 7 MLJ 225; [2010] 1 LNS 23, HC (refd)
G *Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor* [1997] 4 MLJ 237, HC (refd)
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, QBD (refd)
H *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, FC (refd)
Stevenson Jordan & Harrison Ltd v MacDonald & Evans [1952] TLR 101, CA (refd)
Subramaniam v Retnam [1966] 1 MLJ 172, HC (refd)
TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd [2018] MLJU 217; [2018] 1 LNS 145, HC (refd)
I *Tan Cheng Kooi & Anor v Public Prosecutor* [1972] 2 MLJ 115; [1972] 1 LNS 146, HC (refd)
Uber BV and Others (Appellants) v Aslam and Others (Respondents) [2021] UKSC 5, SC (refd)

Vila Harapan (M) Sdn Bhd v Serdang Ria Sdn Bhd & Anor [2011] 1 LNS 215, HC (refd)

Legislation referred to

Contracts Act 1950 ss 17, 24(e), 63
Criminal Procedure Code s 107(4)
Employment Act 1955
Employment Rights Act 1996 [UK]
Evidence Act 1950 ss 73A, 73A(3), 74, 75, 76, 77, 78, 78A, 101, 114(g)
Goods and Services Tax Act 2014 (repealed by Goods and Services Tax (Repeal) Act 2018) s 56(3)(b)
Hire Purchase Act 1967 s 38, First Schedule
Industrial Relations Act 1967
National Minimum Wage Act 1998 [UK]
National Wages Consultative Council Act 2011
Penal Code ss 331, 334, 415
Registration of Businesses Act 1956
Working Time Regulations 1998 [UK]

Muhamad Zakuan bin Mokhtar (Rozita Wan Hasszry & Assoc) for the plaintiff. Muhammad Yunus bin Mohd (Yeoh Wen De with him) (Yunus Ali dan Kam) for the defendant.

Su Tiang Joo JC:

INTRODUCTION

[1] The court was tasked to decide on the nature of the relationship between the plaintiff on the one hand and the first and second defendants (hereinafter referred to as 'D1' and 'D2' respectively or the defendants collectively as the case may be) on the other.

[2] The plaintiff claimed he was employed by D2 commencing 27 February 2010 until he was wrongfully dismissed on 24 October 2016 (exh P4 BOD C p 74). And, whilst so employed he was trapped into a scheme (encl 49 para 16) whereby he became enslaved for about seven years (encl 49 paras 25 and 45).

[3] The defendants' version is very different. They provide the means for the plaintiff to become an entrepreneur in a transport business (notes of proceedings 'NOP' Vol 4 p 449 line 22 to 450 line 12).

[4] In summary, D1 and D2 are involved in the business of producing and selling ready-mixed concrete ('RmC') to their customers under their holding

company, Wan Yee Holdings Sdn Bhd. D1 is the marketing arm whereas D2 manufactures RmC.

[5] Contracts were made between the plaintiff and the business entity named Usaha Kati Enterprise of which D1 is the sole proprietor. Under these contracts (exh P1 BOD F pp 341–357 and exh P3 BOD F pp 359–376) named Transport Agreements (Driver Ownership Scheme or 'DOS'), Usaha Kati Enterprise was to provide services as an independent contractor to deliver RmC to the customers of D1 (Usaha Kati Enterprise shall also refer to the plaintiff unless expressly stated otherwise or the context does not so permit). Under the two contracts made, subject to terms contained therein, D1 sold a mixer-truck each, one with registration number WEF 5801 and another with registration number WYX 9397 to the plaintiff who was to pay for the mixer-trucks with the income earned in making deliveries to D1's customers. At the end of these two contracts, the plaintiff gets to own the mixer-trucks and it is for the plaintiff to then to decide whether he wants to sell the trucks for a profit or continue with the business.

[6] After a trial conducted over nine days with five witnesses called and with written and oral submissions presented, this court had on 7 April 2021 dismissed the plaintiff's claims with costs. Dissatisfied, by notice of appeal filed on 3 May 2021, the plaintiff appeals against part of the decision but he did not set out which part of the decision that he is appealing against. I then directed the learned senior assistant registrar to ask the learned counsel for the plaintiff to clarify but instead of doing so, he extended to this court a copy of his memorandum of appeal filed in the Court of Appeal setting out his grounds of appeal.

THE PLAINTIFF'S CLAIMS

[7] The plaintiff's amended statement of claim is prolix (encl 16 pp 6–25) comprising 59 paragraphs with numerous subparagraphs all in small font running into 20 pages. In this regard, I endorse the view of His Lordship, Wong Siong Tung JC in *Lee Kui Yin & Ors v Jabatan Pendaftaran Pertubuhan Malaysia Negeri Sabah & Anor* [2021] MLJU 257; [2021] 1 LNS 217 that the filing of prolix pleadings is to be discouraged.

[8] The plaintiff claimed for a declaration that:

(a) the two transport agreements (DOS) one dated 27 February 2010 (exh P1 BOD F pp 341–357) and another dated 8 October 2013 (exh P3 BOD F p 359–376) made between him and D1 are unlawful and void;

(b) his signature on the transport agreement (DOS) dated 25 April 2016 (exh D5) said to have been made between him and D1 had been forged by D1;

(c) he was an employee of D2 for the period 27 February 2010 until 24 February 2016;

(d) he is entitled to damages for wrongful dismissal as a lorry driver of D2;

(e) he is entitled to six months' notice or salary in lieu thereof by way of compensation; and

(f) the defendants were not entitled to make any deductions from his monthly income;

[9] The plaintiff also claimed for:

(a) D1 and D2 to jointly and severally pay him general, aggravated and exemplary damages to the sum of RM1.5m;

(b) D2 to pay him special damages to the sum of RM350,506.32;

(c) interest at 5% on the judgment debt until full payment;

(d) costs of the action; and

(e) such further or other relief as may be deemed fit by this honourable court.

[10] With respect, despite the prolixity of the amended statement of claim, the underlying premise of the plaintiff's claim is that the relationship between him and D2 for the period from 27 February 2010 until 24 October 2016 is one of master and servant ie he was in a contract of service and not contract for services.

[11] And, if the court agrees with him, the monetary transactions during this period of five years and eight months where he asserted he was enslaved, will have to be reviewed with all deductions made by the defendants (encl 49 paras 41–42) from his income in running the two mixer-trucks are to be refunded premised upon him being an employee and not an independent contractor and be repaid to him together with the alleged losses suffered by him in the form of depreciation of the mixer-trucks when he disposed the same.

[12] The plaintiff also claimed that the defendants had conspired to defraud him through the use of the first transport agreement (DOS) dated 27 February 2010 (exh P1) and the second transport agreement (DOS) dated 8 October 2013 (exh P3) and that his signature on the transport agreement (DOS) dated 25 April 2016 (exh D5 BOD F pp 377–388) had been forged by D1 and he should be awarded general, aggravated and exemplary damages.

THE DEFENDANTS' DEFENCE

[13] The plaintiff had on 3 August 2009 registered a business under the name of Usaha Kati Enterprise and using this business entity entered into a business or commercial arrangement with the defendants.

[14] The plaintiff was at all times an independent contractor and not an employee.

[15] The disputed agreements are all valid and lawful. These agreements have been performed without any complaints until they were lawfully terminated by reason of the plaintiff having assaulted and battered a female employee who was pregnant at the material time (encl 59 p 5 para 13 and BOD F p 419). For the plaintiff to then assert and claim that he was an employee and one who was dismissed is mala fide.

[16] Reliance was placed upon the termination provision in cl 7 of the second transport agreement dated 8 October 2013 (exh P3 BOD F p 371). Clause 7 provides as follows:

> 7. The Company shall have the right to terminate this Agreement immediately without being liable for any compensation whatsoever, but without prejudice to any of its rights to claim against the Contractor if the Contractor shall have committed a breach of any covenants and conditions on its part herein contained or in the opinion of the Company is guilty of conduct tending to bring itself or the Company or any related company into disrepute or shall have caused by its acts or omissions the Company or any related company to be at a competitive disadvantage or fail to keep trade and related information/secrets of the Company or any related company or shall have committed an act of bankruptcy or entered into any arrangement or composition with its creditors or suffered execution to be levied on its property. (Encl 59 p 5 para 13)

[17] The plaintiff accepted the termination without any protest and had in fact by letter dated 28 October 2016 requested D1 for the second transport agreement (DOS) for mixer-truck No WYX 9397 to be awarded to his friend, Mohd Hasrul bin Mohd Sapuan (No KP 780118–08–6779) who will be paying any summonses issued by the Police, JPJ and the Land Public Transport Agency ('SPAD') together with any monthly instalments or deductions.

[18] In fact, the plaintiff being satisfied and happy with the driver ownership scheme had after buying his first mixer-truck with registration number WEF 5801 under the first transport agreement (DOS) dated 27 February 2010 entered into another agreement, the second transport agreement (DOS) dated 8 October 2013 and bought another mixer-truck with registration number WYX 9397 with the plaintiff entering into yet another Transport Agreement

(DOS) dated 25 April 2016 (exh D5 BOD F pp 377–388) with the earlier mixer-truck WEF 5801 but which the plaintiff alleged carry a forged signature of his. Therefore, at the material time prior to the termination of the second transport agreement (DOS), he was the beneficial owner of two mixer-trucks and was entitled to employ or hire his own staff such as drivers for these mixer-trucks.

[19] Given the circumstances, the plaintiff can hardly assert he was an employee and in any event he is estopped from claiming that he was one.

ISSUES

[20] The parties were not able to agree upon a list of agreed issues to be tried.

[21] After perusing the pleadings, the evidence led and the submissions both written and oral presented by learned counsel for the plaintiff and the defendants, in dismissing the plaintiff's action I had on 7 April 2021 given the following brief grounds in Bahasa Malaysia:

i) Plaintif bukannya seorang pekerja kepada Defendan Kedua dan walau bagaimanapun, Plaintif adalah diestop daripada menuntut beliau adalah seorang pekerja Defendan Kedua;

ii) Sebaliknya Plaintif adalah seorang kontraktor bebas dan walau bagaimanapun, daripada urusan sebegitu lama diantara beliau dengan kedua-dua Defendan, beliau adalah diestop daripada menafikan beliau bukannya seorang kontraktor bebas;

iii) Plaintif telah gagal membuktikan atas dasar imbangan kebarangkalian bahawa tandatangan beliau di dalam Perjanjian Vehicle Sales & Purchase Agreement & Transport Agreement (Driver Ownership Scheme) bertarikh 25.4.2016 telah dipalsukan oleh Defendan Pertama;

iv) Kedua-dua Kontrak Transport Agreement (Driver Ownership Scheme) bertarikh 27/2/2010 dan 8/10/2013 adalah sah dan tidak menyalahi undang-undang dan walaubagaimanapun perjanjian bertarikh 27/2/2010 telahpun dilakukan dengan penuh;

v) Pemotongan GST 6% adalah tidak menyalahi undang-undang dan Mahkamah bersetuju Plaintif sendiri tidak memberi sebarang keterangan kenapa beliau tidak menuntut kembali apa yang dipotong daripada Jabatan Kastam,

vi) Penamatan kontrak Transport Agreement bukan merupa suatu pemecatan salah seorang pekerja; dan

vii) Maka, tuntutan Plaintif adalah ditolak dengan kos.

[22] With learned counsel for the plaintiff having extended to this court a

A copy of the plaintiff's memorandum of appeal, this court understood that the plaintiff's appeal is only against that part of the decision:

(a) that held that he was an independent contractor to D2, that is, he was not an employee of D2;

B (b) that did not hold that he had been defrauded by his earnings having been deducted with 6% Goods and Sales Tax ('GST');

(c) that did not decide that D2 ought to refund him a sum of RM101,166.56 for the price of the mixer-truck WFX 9397 which he had C paid to D1 through D2;

(d) that did not decide that he had made out his claim premised upon the tort of conspiracy against D1 and D2 who had both conspired to manipulate and use the plaintiff's services for themselves only;

D (e) dismissing his claims for special damages of RM350,506.32 which included a claim for GST of RM5,719.06 (encl 16 Bundle A p 22 para 56 of amended SOC) and general, aggravated as well as exemplary damages; and

E (f) which did not decide that costs ought to be borne by the defendants as a large part of the reliefs claimed by the plaintiff ought to have been allowed.

[23] Therefore, the issues can be summarised as follows:

F (a) whether the plaintiff was an employee of D2 and tied up with this issue is whether the first and second transport agreements (DOS) made between the plaintiff and D1, one dated 27 February 2010 (exh P1) and the other dated 8 October 2013 (exh P3) were fraudulent, unlawful and void as to make out the plaintiff's claim of the tort of conspiracy against G D1 and D2 as to entitle him to damages, special, general, aggravated and exemplary;

(b) whether the imposition of 6% GST on the fuel purchased by the plaintiff, the costs of fixing a Global Positioning System ('GPS') each on H the mixer-trucks, monthly charges for the GPS, vehicle inspection charges by the Registrar and Inspector of Motor Vehicles ('RIMV' or Jabatan Pengangkutan Jalan 'JPJ') was fraudulent amounting to cheating and in contravention of the Goods and Services Tax Act 2014;

(c) whether D2 was obliged to refund a sum of RM101,166.56 for the price I of WYX 9397 which he had paid to D1 through D2;

(d) whether his signature on the transport agreement (DOS) dated 25 April 2016 (exh D5) made between him and D1 had been forged by D1; and

(e) whether the plaintiff is estopped from pursuing his claims.

THE COURT'S ANALYSIS AND FINDINGS

Whether the plaintiff was an employee of D2 and validity of the first and second transport agreements (DOS)

[24] Learned counsel for the plaintiff in his written submissions (encl 49 para 11) made it clear that the plaintiff was not an employee of D1 because D1 did not give instructions to the plaintiff as a subordinate and reliance was placed upon the authority of *Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor* [1997] 4 MLJ 237. However, he submitted that D2 was the plaintiff's master.

[25] Under Industrial Law jurisprudence, when a person alleges that he is an employee or to be more accurate, a workman, and has been wrongfully dismissed, he can seek redress under the Industrial Relations Act 1967 (Revised 1976) Act 177. However, if he does not do so, he is still entitled to seek redress in the civil courts but then his remedy is one for breach of contract. See *Ng Kim Fong v Menang Corporation (M) Berhad* [2020] MLJU 644; [2020] 1 LNS 1263 (CA) where Mary Lim Thiam Suan JCA (now FCJ) said:

> [168] In so far as quantum is concerned, we are mindful of the common law's stricture as to the amount of damages that is permissible for loss of employment. At the outset, we are constrained to state that we do not disagree with the proposition that was lucidly enunciated by HRH Raja Azlan Shah CJ (Malaya) in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238; [1980] 1 LNS 156 FC (p 239), where he said:
>
> > *In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract,* eg, a summary dismissal where the workman has not committed misconduct.
> >
> > *The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given.*
> >
> > He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer.
> >
> > He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz, an award of damages. Further, the courts will not normally 'reinstate' a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v National Dock Labour Board* [1957] AC 488, 500, 507; *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407; [1962] 1 WLR 1411 At the most it will declare that it was wrongful. However, his common law right has been profoundly affected in this

country by the system of industrial awards enacted in the Industrial Relations Act, 1967.

The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him.

Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.

[169] Later in *AETNA Universal Insurance Sdn Bhd v Ooi Meng Sua* [2001] 3 MLJ 502; [2001] 3 CLJ 1 CA Gopal Sri Ram JCA (at 504) said:

The common law governing the relationship of master and servant is clear. It is contained in the following propositions.

(1) A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination.

(2) If a dismissal is challenged, the burden is on the master to justify it: *SR Fox v Ek Liong Hin Ltd* [1957] 1 MLJ 1.

(3) *If the master fails to justify the dismissal, then he must pay the servant such damages as are just in lieu of proper notice.*

(4) A master who has given no reason or a bad reason for summarily dismissing his servant may, at the trial of the action, justify the dismissal for a good reason.

[170] We were told that the appellant's complaint of wrongful dismissal was dismissed by the Industrial Court. It was submitted for the respondent that the Civil Court and by extension this Court is barred from giving any form of relief for the appellant's wrongful dismissal.

[171] In this regard, the respondent relied on s 20(4) of the Industrial Relations Act 1967 (Revised 1967) ('the IRA') which reads: '(4) Where an award has been made under sub-s (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal'. It is of course rather tempting to conclude that based on a plain reading of section 20(4) of the IRA, the appellant's right to be paid her contractual benefits has been snuffed out merely because she lost in the Industrial Court.

[172] However, having considered the issue, and based on the peculiar facts of the present appeal, *we do not agree that se 20(4) of the IRA bars the civil courts from granting the appellant relief by way of payment of her contractual entitlement i.e. retirement benefits which she was deprived of due to the 'forced retirement' in the circumstances as described in the earlier part of our conclusions.* (Emphasis added.)

[173] *Whilst we agree that the civil courts are not permitted to award any form of monetary compensation for wrong (sic) dismissal (apart from the payment of wages in lieu of notice), we do not think that se 20(4) of the IRA can be relied upon to deny the appellant her retirement benefits, which she would have been entitled to had she been allowed to work up her maximum retirement age of 60 years.* (Emphasis added.)

[174] Of course, the respondent would in our view have stood on firmer ground had the Industrial Court handed down an award in the appellant's favour as in that event, all the monetary components of her claim predicated on a complaint of dismissal without just cause or excuse would or may have been subsumed in the award of the Industrial Court.

[175] We must go on record as stating that the factual situation here is quite unique. Thus, but for the events which took place on 19 July 2016, the appellant would have worked until her 60th birthday and thereby entitling her to her full retirement benefits as per her contract of employment.

[176] *Accordingly, we do not see any legal (statutory) or equitable impediment or restriction on this Ccourt granting the appellant relief by way of her retirement benefits which she was contractually entitled to in the ordinary course of events.* (Emphasis added.)

[26] Therefore, in order to succeed in his claim, the plaintiff had to prove that he was under a contract of service with D2 and that he was dismissed and thereafter, it is was then for D2 to justify the dismissal.

[27] Ordinarily, all that the workman needed do is to show his contract of employment which would normally be in writing and the notice of termination and it is then for the employer to justify the dismissal was with just cause and excuse. However, the plaintiff had no such documentary contract of employment to show that he was an employee of D2.

[28] Instead, the plaintiff asserted that his relationship with D2 is tied up orally and was evidenced by the documents in exhs P28A to P28ACO (BOD D pp 97–217), exhs P29A to P29ABT (BOD E pp 218–340) together with the admission by one of the directors of both D1 and D2 namely Chung Hoi Tong (SD5) who admitted that more than 90% of the working hours of the plaintiff was dedicated to D2.

[29] The plaintiff further relied upon the following to assert that D2 was his master (encl 49 paras 5 and 10–13):

(a) pursuant to cl 6.8.1 of the first and second transport agreements (DOS) as the contractor, he was to provide his service and use of the vehicle exclusively for the company which is D1 and he had undertaken and covenanted that he shall not provide similar service or any other services to another party (encl 49 p 3 para 5);

(b) cl 8 prohibited the plaintiff from assigning the agreement to any third party (encl 49 p 4 para 6 p 5 para 10 first para);

(c) he was obliged to work by clocking in from 8am and to clock out only after he has completed all deliveries as instructed by D2 (encl 49 p 4 para 7);

(d) the licence for transport be it in Class A, B or C is applied for by D2 as admitted by SD5, the director of both D1 and D2, and the plaintiff was therefore obliged to render his services only to D1 or D2 and by reason thereto this was how D2 exerted control over the plaintiff (encl 49 p 4 para 8);

(e) both the mixer-trucks WYX 9397 and WEF 5801 were to be parked and to be kept overnight in D2's premises as was required under cl 6.10.5(v) of the transport agreements (DOS);

(f) he was obliged to wear a uniform (encl 49 para 10-1);

(g) there are 20 to 30 mixer-trucks all uniformly painted in green (encl 49 para 10-2); and

(h) SD2, (Soo Kok Sing), the General Manager of both D1 and D2 (DWS 2) confirmed that D2 had a punch card system to record the time to report for work and there are about 30 other drivers who have a scheme similar to that of the plaintiff's (encl 49 p 5 para 103 and 10-4).

[30] Learned counsel for the plaintiff submitted that because D2 controlled the daily activities of the plaintiff, the latter was an employee of D2. Reliance was placed by learned counsel for the plaintiff on the Federal Court authority of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 and he quoted therefrom the following:

> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. *The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions.* Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined to, the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.
>
> ... It is equally clear, from its award, that the Industrial Court addressed its mind to the nature of the duties and functions of the appellant as well as to the degree of control exercised by the respondent over him. It asked itself the right question and took into account relevant considerations when arriving at its decision. We are therefore of the view that the finding by the Industrial Court that the respondent is a workman, based upon its evaluation of the evidence adduced before it, is correct. Accordingly, we are satisfied that the Industrial Court did not commit any error of law when it came to its conclusion.

[31] However, with respect to learned counsel for the plaintiff, the passage emboldened above by this court and the following passages of the Federal Court in *Hoh Kiang Ngan* which were not quoted (above) are also highly relevant:

> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 311; [1981] 1 LNS 5. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. *An independent contractor who is engaged under a contract for services is not a workman* under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
>
> *There is not a single satisfactory test that is available for the determination of the issue.*
>
> I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions in the company. *In this case in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company.* A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company.

[32] Applying the test laid down in *Hoh Kiang Ngan*, premised upon the oral evidence led and the documents admitted I was of the opinion that the plaintiff was in fact an independent contractor and not a workman of D2.

[33] The following are the evidence both oral and documentary which drove me to conclude that the plaintiff was not a workman of D2:

(a) the plaintiff himself had registered a business under the Registration of Businesses Act 1956 under the name of Usaha Kati Enterprise on 3 August 2009 as a sole proprietor (BOD B pp 20–22) and this documentary piece of evidence was a Part A document which meant that it was agreed as to both existence and contents;

(b) using this business entity of Usaha Kati Enterprise, he then bought not one but two mixer-trucks by entering into a commercial transaction involving three Transport Agreements (Driver Ownership Scheme) with D1, one dated 27 February 2010 (exh P1 BOD F pp 341–357), another dated 8 October 2013 (exh P3 BOD F pp 359–376) and the third one dated 25 April 2016 (exh D5 BOD F pp 377–388);

(c) the plaintiff did not advance any money for the purchase of the mixer-trucks. Instead, the purchase price were to be paid from the income he was to earn by providing his services as an independent

contractor under his business entity of Usaha Kati Enterprise to transport the goods using these mixer-trucks (exh P1 BOD F p 341 cl 2.3; exh P3 BOD F Recital 2 para 3; and exh D5 BOD F cl 6.1 p 380);

(d) this court accepted the evidence of Mr Chung Hoi Tong, SD5, a director of both D1 and D2, whose evidence (encl 48 pp 449–450) was clear and unshaken during cross-examination to the effect that the two defendant companies are sister companies in a holding group of companies; that the DOS saw D1 selling a mixer-truck each under separate transport agreements to the plaintiff to encourage and assist the plaintiff to be an entrepreneur in a transport business with D2 providing work to the plaintiff as an independent contractor to carry the RmC to D1's customers; that the plaintiff earns money from such deliveries to pay for the mixer-trucks and once the mixer-trucks are paid, he gets to own them and it was then for him to decide whether to sell them at a profit or to continue with the business; and because the plaintiff is the beneficial owners of these trucks he would have the incentive to take very good care of the trucks and maintain them well (resulting) in less break-downs, less loss of spare parts resulting in good service to the defendants' customers; and that during the contract period if he works hard he will earn extra income and Mr Chung, SD5 concluded that this business model is beneficial for all parties involved and it is the most efficient way to operate this business;

(e) in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, the company which made and sold concrete, introduced in 1959, a system of delivery by owner drivers for the purpose of stimulating efficient cartage and care of the vehicle and in this case L entered into a contract with the company for the carriage of concrete. He also entered into a hire-purchase agreement for a lorry with *an associated hire-purchase company*. The lorry was painted in the concrete company's colours and was adapted to carry their mixing unit L was to procure an 'A' carrier' licence, was to make the lorry available at all times to the company, and was to use it for no other purpose. He was entitled to employ competent substitute drivers, but if the company were dissatisfied he was to provide another substitute; the company was entitled to require L himself to drive the lorry for the maximum hours permitted by law, save for holiday periods. L was to wear the company's uniform and to carry out all reasonable orders from competent servants of the company, 'as if were an employee of the company'. L was to maintain both the lorry and the mixing unit, including the making of fair wear and tear renewals at his own expense. He was to pay all running costs, and not to charge the vehicle or mixing unit, which were to be insured by the company. Payment to the owner driver was to be on fixed rates per cubic yard for each radial mile, with provision for minimum annual earnings. L with other owner drivers,

employed and paid a relief driver with the company's consent. Either party could determine the contract by notice, the company having the right to acquire the vehicle. The company gave no instructions to L about the method of driving the trucks from the plant to the place of delivery. It was held that the contract between L and the company was one of a contract for services with the emphasis (see page 442 of the law report at para C) being on the mechanical traction that needed to be done by L *was to be done by his own property in his own possession and control.* (Emphasis added.);

(f) learned counsel for the plaintiff sought to distinguish *Readymixed Concrete* by asserting that there is no contract between the plaintiff and D2 with the term that he was to be an independent contractor. With respect, I find this assertion unmeritorious because:

(i) in *Readymixed Concrete* the sale of the mixer-truck is by an associated company and both D1 and D2 are associated companies;

(ii) D2 was acting as an agent for D1 under the transport agreement (DOS) as can be seen in the documentary evidence produced by the defendants in the form of the letters (exhs D40 and D41 BOD F pp 402 and 407 respectively) where D1 had authorised D2 to act on its behalf under the transport agreements (DOS);

(iii) both the defendants have been operating as a single commercial unit in the business arrangement which commenced since the plaintiff trading as Usaha Kati Enterprise entered into the first transport agreement (DOS) in 2010 and to seek to split up D1 and D2 in his claim by asserting that he was an employee of D2 was contrived and mala fide; and

(iv) contrary to the plaintiff's assertion, this court did not find that the first and second transport agreements (DOS) were tainted with fraud.

(g) besides the test in *Readymixed Concrete,* there is also the entrepreneur test which Cooke J formulated in *Market Investigations Ltd v Minister of Social Security* [1969] 2 WLR 732 at p 737 as follows:

> ... the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service ... *The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for*

> *investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.* (Emphasis added.)

(h) still on the entrepreneur test, in *Montreal Locomotive Works Ltd v Montreal and A-G for Canada* [1947] 1 DLR 161 at p 169 Lord Wright held that:

> In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

(i) applying the entrepreneur test it can be readily seen that the main piece of equipment required for the transporting of RmC is the mixer-truck and this was supplied by the plaintiff; that the plaintiff could hire his own drivers to drive the mixer-trucks, he undertook the financial risks for his business under Usaha Kati Enterprise managed by he himself as the sole proprietor and he profits solely from the sound management of the performance of his tasks and wherefore he was 'carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior', see *Montreal Locomotive Works Ltd* as well as *Market Investigations Ltd*;

(j) apart from the entrepreneur test, there is the also the Part-and-Parcel-of-Organization or Integral Test. In *Bank Voor Handel En Scheepraart NV v Slatford* [1953] 1 QB 248, Lord Denning held that 'the test of being a servant does not rest nowadays on submissions to orders. It depends on whether the person is part and parcel of the organization'. See also *Stevenson Jordan & Harrison Ltd v MacDonald & Evans* [1952] TLR 101 where Lord Denning LJ held as follows:

> under a contract of service, a man is employed as a part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work although done for the business, is not integrated into it but is only accessory to it.

> This test has been endorsed by our Federal Court in *Employees Provident Fund Board v MS Ally & Co Ltd* [1975] 2 MLJ 89 and *Mary Colete John v South East Asia Insurance Bhd* [2010] 6 MLJ 733;

(k) applying the integral test, it can be seen that the plaintiff's work was not integrated into the defendant's organisation but only accessory to it as he had his own employees, he was not paid any salary, he invested his own capital and equipment in the form of the mixer-trucks and managed his own financial risks and business in having to be responsible for his own repairs and maintenance of the mixer-trucks and any summonses that he may be issued with;

(l) learned counsel for the plaintiff relied upon the UK Supreme Court case of *Uber BV and Others (Appellants) v Aslam and Others (Respondents)* [2021] UKSC 5 to show that by analogy given the degree of control that D2 exerts over the plaintiff as Uber did over its drivers, the plaintiff ought to be held to be a workman as was decided by the UK Supreme Court that the employment tribunal was entitled to find that drivers whose work was arranged through Uber's smartphone application ('the Uber App') work for Uber and that they were working under such contracts whenever they were logged into the Uber App within the territory in which they were licensed to operate and ready and willing to accept trips. The UK Supreme Court analysed the Uber System and accepted that the employment tribunal had made a number of findings about standards of performance which drivers are expected to meet and actions taken where drivers fail to meet these standards, for eg the tribunal found that a 'Welcome Packet' of material issued by Uber London to new drivers included numerous instructions as to how drivers should conduct themselves, such as 'Polite and professional at all times', 'Avoid inappropriate topics of conversation' and 'Do not contact the rider after the trip has ended'. Other material in the Welcome Packet, under the heading 'What Uber looks for' stated High Quality Service Stats: We continually look at your driver rating, client comments, and feedback provided to us. Maintaining a high rating overall helps to keep a top tier service to riders. Low Cancellation Rate: when you accept a trip request you have made a commitment to the rider. Cancelling often or cancelling for unwillingness to drive to your clients lead to poor experience, High Acceptance Rate: Going on duty means you are willing and able to accept trip requests. Rejecting too many requests lead to rider confusion about availability. You should be off duty if not able to take requests'. Besides these, the UK Supreme Court held that there was such a high degree of control and regulation such as that if the acceptance rate of the drivers fall below 80%, they will receive warning messages reminding the driver to do so and may lead to the driver being logged off if the driver's acceptance rate does not improve, and the UK Supreme Court held that the employment tribunal was justified to hold that Uber drivers are workers who are entitled to rights under the National Minimum Wage Act 1998 and associated regulations to be paid at least the national minimum wage for work done and entitled to rights under the Working Time Regulations 1998 which include the right to receive paid annual leave and other rights, all of which are rights conferred by legislation on 'workers' under the UK Employment Rights Act 1996, National Minimum Wage Act 1998 and Working Time Regulations 1998;

(m) however, in this case, the plaintiff's claims were not for a minimum wage or any of those statutory rights under the 'workers' legislation. Indeed,

the plaintiff's claim was not for a minimum wage at all and neither was his claim initiated in the Labour Court or Industrial Court established under our Malaysian employment legislation such as the Employment Act 1955 (Revised 1981) or the Industrial Relations Act 1967 (Revised 1976) but in the Civil Court. As alluded to above, (see para [25] above) his claim was premised upon contract and the tort of conspiracy to defraud. More importantly, based upon the evidence led in this case, what was required of the plaintiff by the defendants under the transport agreement (DOS) pales in comparison with what is imposed upon the Uber drivers by Uber BV and will be made clearer below;

(n) Haruddin bin Ali (SD1), the manager of D2 and who manages the contractor drivers under cross-examination was referred to several documents setting out the earnings of the plaintiff and when put that these represent the income of the plaintiff (encl 41 NOP of XE on 7 October 2020 p 119 and p 20 lines 1–4) gave very telling evidence as follows:

> Peguam Plaintif: Jadi, itu adalah jumlah pendapatan En Ismail Bin Hashim. En Haruddin setuju?
>
> SD1: Tidak setuju Yang Arif. Berkenaan dengan pendapatan mereka bergantung kepada semasa dengan kerajinan mereka.

(o) that the business or commercial relationship was made up of the plaintiff's business entity, Usaha Kati Enterprise, and the defendants' group of companies including both D1 and D2 was clear from the time the plaintiff through his business entity, Usaha Kati Enterprise had purchased his first mixer-truck to be on his way to be an entrepreneur as can be seen in, inter alia, the invoices dated 2013 until 2016 (see BOD D and E p 97–340) where D2 had been computing the fees for the deliveries made and due to the plaintiff with nary a complaint by the plaintiff;

(p) this court declined the invitation by the plaintiff to rewrite the commercial and contractual relationship that the plaintiff had entered into and from which he had clearly benefited from until the fateful incident on 18 October 2016 where he assaulted a female staff and saw this business relationship terminated;

(q) on the plaintiff carrying goods only for the defendants, it was explained by SD5 under cross-examination (NOP Vol 4 pp 489–490) that a transport licence is required to carry goods and a 'C' licence (BOD F exh P3 p 360 cl 3.2) is meant for the carriage of only the companies' goods and this court understood him (NOP Vol 4 p 489 line 15 to p 490 line 10) to mean that in answer to the plaintiff's suggestion that he has to work only for the defendants, the plaintiff could have on his own applied for an 'A' licence as to entitle him to carry private goods but the

plaintiff was content to rely upon the steady flow of work given by the defendants and to rely upon the defendants' carrier licence to carry only the goods of the defendants under the business arrangement he had entered into;

(r) SD5 (NOP Vol 4 p 489 lines 8–12) testified that the plaintiff was not compulsorily required to wear what the plaintiff calls a uniform which is a Polo T-Shirt carrying the names of D1 and D2 (exh P23 BOD C p 85). When shown the photo of the alleged uniform, SD1 said (encl 41 NOP p 123 lines 4–6): not

> Peguam Plaintif: Ini kah uniform yang di pakai oleh En Ismail tiap-tiap hari?
>
> SD1: Ini bukan uniform. Ini adalah baju untuk iklan. Siapa saja boleh pakai Yang Arif.

(s) besides the above, the evidence points to the fact that the plaintiff was happy to enjoy the benefits as an independent contractor with him selling off the first mixer-truck he came to own to one Murli (see NOP of his testimony under XE on 15 September 2020 at p 82) and where he said he was happy can be seen in the notes of the inquiry (exh D8 BOD F pp 418–420) on the incident where he assaulted and punched the head of one of the defendants' (pregnant) female staff:

> Soalan 3. Bagaimana suasana bekerja di IGB Plant?
>
> Jawapan 3. *Seronok … tiada masalah kerana ianya periuk nasi saya.*

(t) the plaintiff had no complaints whatsoever that he was not treated as a workman with the usual terms of employment such as annual leave, annual appraisal, bonus, medical benefits, statutory contributions such as that towards the Employees Provident Fund ('EPF') or Employees' Social Security Fund ('SOCSO') and monthly income tax deductions and the issue of him being a workman only arose for the first time in this action (NOP of 5 September 2020 pp 40–48). The logical and reasonable inference to be drawn was that his claim of being a workman under a contract of service was an afterthought;

(u) whilst he was happy to enjoy the benefits that came with him being entitled to the driver ownership scheme that saw him not only owning the trucks without having to pay for them in advance or having to take any loans carrying interest, as well as he being an employer where he could hire a driver or drivers for the trucks that he owned, he sang a different tune when his contracts were terminated by reason of his misconduct. It cannot be denied that a fundamental duty of an employee is that of good faith and fidelity where the employee is to expend time wholly for the master and not be doing his own business and a competing one at that, unless he was at all material times, an independent contractor;

(v) all the three transport agreements (DOS) (exhs P1, P3 and P5) provided that the plaintiff was to offer his services as an independent contractor and cl 6.1 of each of these agreements expressly provided that the plaintiff was an independent contractor engaged purely as a delivery contractor or transporter, that the relationship between the plaintiff and D1 did not in any way gave rise to the relationship of master and servant or employer and employee and the plaintiff, his drivers, servants or agents were not employees of D1 and were not entitled to severance pay, bonus, EPF or SOCSO or any other similar payments or statutory contributions by D1;

(w) one particular term of each of the transport agreements (DOS) made it clear beyond a doubt that the plaintiff was not a workman because as mentioned earlier, the contracting entity used by the plaintiff was his business entity, Usaha Kati Enterprise, as the contractor and pursuant to cl 6.9 (BOD F exh P1 p 348 exh P3 p 366) and cl 6.8 (BOD F exh P5 p 382), the contractor was at liberty to supply any driver together with the mixer-truck so long as the driver is competent and suitably qualified with a valid driving licence of an acceptable standard. This clearly debunks the case theory advanced by the plaintiff that he was subjected to the control of the defendants and in particular D2 when he himself need not be the driver of the mixer-truck and could supply any suitably qualified driver other than himself;

(x) Haruddin bin Ali (SD1), the manager of D2 and who manages the contractor drivers, under cross-examination (encl 41 NOP of XE on 7 October 2020 pp 120–121) made it clear that the plaintiff worked according to his own time when he said:

> Peguam Plaintif: En Haruddin, Ismail Bin Hashim, dia berkerja berapa hari dalam seminggu?
>
> SD1: Bergantung kepada En Ismail Bin Hashim. Kami menguruskan sahaja. Sebenarnya, En Ismail Bin Hashim dia berkerja mengikut waktu dia, sebab dia adalah kontraktor. Saya hanya menguruskan sahaja sebagai pentadbiran.
>
> ...
>
> PP: Pukul berapa dia masuk kerja?
>
> SD1: 8, 9, 10 ... bergantung pada waktu dia nak masuk.
>
> PP: Dia balik pukul berapa?
>
> SD1: Bergantung pada dia. Ikut suka dia. Ada yang pukul 3 petang pun ada. Pukul 8.00 malam pun ada. 6.00 petang pun ada. Tak mari pun ada. Yang Arif. Bergantung pada dia. Dia adalah kontraktor. So, kita tak ada pegangan soal masuk kerja ataupun soal waktu berapa dia balik kerja. Dia hanya maklumkan kepada kita pukul berapa dia nak balik. Itu sahaja Yang Arif.
>
> ...

PP: Maknanya dia boleh suka-suka hati dia balik?

SD1: Ya saya.

(y) and, as pointed out by learned counsel for the defendants, the plaintiff made a profit of RM384,391.86 under the first transport agreement (DOS) and a profit of RM173,113.65 under the second transport agreement (DOS) and, therefore, in my view, he certainly cannot claim that he had fallen below the minimum wage standard of RM1,100 per month in Malaysia as prescribed by the National Wages Consultative Council Act 2011 (Act 732), if at all, he qualified, which he did not;

(z) he who alleges must prove, see s 101 of the Evidence Act 1950 and it was incumbent upon the plaintiff in this Civil Court where he had sought to make his claim, as opposed to the Industrial Court, to prove on a balance of probabilities he was a workman as he said he was but he himself had admitted on more than one occasion not only orally but in writing that he was an independent mixer-truck contractor as the following evidence show:

(i) in para 2 of his letter dated 28 October 2016 addressed to D1 (exh D6 BOD C p 75) he said:

> Saya, Ismail bin Hashim (No K/P 730730-08-6243) sebagai kontraktor *lori pembancuh* WEF5801 ... *dibawah Global Mix Sdn Bhd* ingin memohon kepada pihak syarikat untuk memberi pelepasan dan kelulusan untuk menjual lori kepada pihak ketiga/pihak luar;

(ii) in para 2 of his letter dated 28 October 2016 addressed to D1 (exh D6 BOD C p 76) he said:

> Saya, seperti nama di bawah sebagai *kontraktor lori pembancuh dengan syarikat Global Mix Sdn Bhd* ingin memohon memindah hakmilik kontrak DOS lori pembancuh yang bernombor WYX 9397 kepada Mohd Hasrul Bin Mohd Sapuan (No. K/P 780118-08-6779).

(iii) during the inquiry on his misconduct on 18 October 2016 to a question posed as to what is his name and his relationship with the D2 (exh D8 BOD F p 418) he said:

> Jawapan: Nama Ismail Bin Hashim dan *saya adalah kontraktor di Global Mix Sdn Bhd*; and

(aa) it has been held that an admission is the strongest evidence possible, see *Vila Harapan (M) Sdn Bhd v Serdang Ria Sdn Bhd & Anor* [2011] 1 LNS 215 as per Nor Bee Ariffin JC (now JCA) and *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & 2 Ors* [1994] 1 MLJ 740; [1993] 1 LNS 103; [1993] 2 AMR 51, and the above admissions by the plaintiff put it beyond a doubt that as a matter of fact that as from 27 February 2010 the date of the first transport agreement (DOS) until the incident on 18

October 2020 when he assaulted D1's staff and which saw his contract Transport Agreements (DOS) terminated, he was not a workman but an independent contractor.

Whether the defendants had conspired to defraud the plaintiff

[34] The main gangplank of the plaintiff's claim was that the defendants had used the transport agreement (Driver Ownership Scheme) to trap him into being enslaved as a workman. See paras 45–48 of the amended statement of claim (Bundle A p 14)

[35] Having held that he was not a workman but an independent contractor and what the plaintiff had entered into was a business relationship through his business entity of Usaha Kati Enterprise, a business relationship which he was happy with until he was terminated by reason of his misconduct, the claim for the tort of conspiracy to defraud premised upon the transport agreements (DOS) falls flat. However, as the plaintiff had raised several other issues, this court will proceed to deal with them.

Omission to provide copy of second transport agreement (DOS)

[36] The plaintiff pleaded that he signed the first and second transport agreements (exhs P1 and P3) because he wanted to support himself and his family but was not provided a copy of these agreements (encl 16 Bundle A pp 7–9 paras 12–17). He went on to allege that it was mala fide of the defendants to deliberately use English in the documents so to prevent him from understanding them and the defendants had hidden them from him until the last minute and that these documents were not stamped. Learned counsel for the plaintiff did not pursue the non-stamping as an issue in his submissions and this court proceeded on the premise that he had abandoned it.

[37] For the allegation about not being provided with the agreements, the plaintiff asserted that there were correspondences, but without identifying them, that the defendants failed to supply these documents despite his lawyer having formally and repeatedly requested for the same (encl 49 paras 14–15).

[38] The plaintiff then went on to refer to the letter of termination (exh P4 BOD C p 74) which was issued under the letterhead of D1 to assert that because it was signed by Harudin bin Ali (SD1) who is an employee of D2, this provided corroboration of cheating ('penipuan') and irregularities ('penyelewengan') carried out by both the defendants jointly.

[39] Learned counsel then went on to point out that Mohd Hasrul bin Mohd Sapuan (SP4) had testified that he alone had signed the (Transport

Agreement) in D35 (BOD F pp 427–440) in the absence of SD2 (Soo Kok Seng, the General Manager) and by reason thereto the Driver Ownership Scheme was a trap scheme masterminded by the defendants to suppress the plaintiff and other drivers under the DOS scheme.

[40] From the narrative above, this court was unable to discern the logic of the arguments put forth to establish fraud and cheating seeing that the plaintiff did not deny that he had signed the two transport agreements (DOS) save that he was asserting that because the agreements were in English, he had been deliberately prevented from understanding the same. In other words this court understood him as raising the defence of *non est factum* in that he ought not to be bound by the agreements he had signed.

[41] On *non est factum*, the Court of Appeal recently in *Lim Peng Hock & Anor v Chuah Peng San & Anor* [2021] MLJU 192; [2021] 1 LNS 119 speaking through Kamaludin Md Said JCA said as follows:

> *Non est factum*
>
> [59] As a whole, by pleading fraud over the transactions including non est factum, the 1st plaintiff tries to show that he was ignorant of what he had signed ie sale and purchase agreement, receipt for deposit, statutory declarations, transfer Form 14A etc. He pleaded he believed they were security documents and he did not know the content thereof or he signed the blank documents/papers.
>
> [60] *The expression 'non est factum' is a Latin expression which means 'it is not his deed'. It is a denial of the execution of an instrument sued on (see 'Black's Law Dictionary', 9th Ed, by Bryan A Garner).*
>
> [61] In the case of *Lim Wen Chih & Anor v Mycom Berhad* [2014] 3 MLJ 691; [2013] 1 LNS 1231, the Court of Appeal held, inter alia that it is a general rule that a party is normally bound by his signature on a document. The Court of Appeal referred to the case of *Tan Lai Wah v First National Bank of Chicago* [1984] 4 PCC 251, the Privy Council held that the burden of establishing a plea of non est factum falls on the party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; it is not, however, an instance of negligence operating by way of estoppel.
>
> [62] The Court of Appeal further held that the principle, a person is bound by his contract regardless that he is ignorant of the language it is written in, is well established citing *Subramaniam v Retnam* [1966] 1 MLJ 172; [1965] 1 LNS 169 *which referred to Ismail bin Savoosah & Ors v Hajee Ismail* [1889] 4 Ky 453 at p 458 where Wood AG CJ said:
>
> > It was argued that the defendant *being ignorant of the English language* he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the

person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained ...

Deliberating upon the above and the facts before the court, we agree with the learned judicial commissioner, that the appellants were not novice businessmen and would not have signed the documents without careful consideration. To put it directly, the appellants were not 'hillbillies', but businessmen of considerable acumen as their assets suggest, they would be so unlikely as to be unbelievable to have signed any document in a foreign country without knowing what it is that they were signing.

[63] Finally it was also held that a person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor (*Saunders v Anglia Building Society* [1971] AC 1004).

[64] In the present case, we are satisfied that non est factum rules cannot apply to the first plaintiff for the following reasons:

(i) Some of the documents signed by first plaintiff are in Bahasa Malaysia which first plaintiff admitted he understand, ie receipt for deposit of RM70,000 (exhibit D20), transfer Form 14A (exh D37) thumb printed by first plaintiff on 10 January 2011, statutory declaration affirmed on 3 December 2012 (exh D35).

(ii) first plaintiff is the big time pilling contractor with the yearly revenue of a few millions as shown in the company search of KHL Piling & Construction Sdn Bhd (CCB Part (2), pp 320–325 or *Rekod Rayuan, Bhg C, Jld* 1, pp 407–412) to which he is the major shareholder cum director.

(iii) He is not hillbilly but seasoned businessman with vast experienced at the age of 50 plus just impossible to sign blank documents/papers, Statutory Declarations, Transfer Form 14A, receipts, sale & purchase agreement, etc. without knowing the content thereof or a least put an enquiries of so many documents that he admitted he had signed not on one occasion but over a period of times.

[42] See also the following cases cited by learned counsel for the defendants:

(a) *AWC Bhd (Formerly known as AWC Facility Solutions Bhd) v Point-Euro (M) Sdn Bhd* [2012] MLJU 474 (HC);

(b) *Gallie v Lee* [1969] 2 WLR 901;

(c) *Rabiah bt Ani v Samsi bin Hj Hasim (t/a Syarikat Perniagaan Jaya) & Anor* [2011] 7 MLJ 225; [2010] 1 LNS 23 (HC);

(d) *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640 (HC);

(e) *Nor Azlina bte Abdul Aziz v Aminah bte Omar @ Minah bte Omar* [1997] MLJU 308; [1998] 2 CLJ 527 (HC); and

(f) *Subramaniam v Retnam* [1966] 1 MLJ 172 (HC).

[43] In the present case, in my view, the *non est factum* rule does not apply in favour of the plaintiff for the following reasons:

(a) in his written submissions (encl 49 para 14), the plaintiff backtracked on not having signed both the transport agreements and in fact conceded that he had executed the transport agreement (DOS) (exh P1) driving the court to infer that the plaintiff had resiled from challenging both the transport agreements (DOS) which were in English. This is because the terms of the second transport agreement (DOS) (exh P3) are almost similar with that of the first and if he dropped his challenge against the first, surely he cannot be allowed to challenge the second as both were in English;

(b) the plaintiff in both his letters of termination, which were in Bahasa Malaysia, clearly referred to the two transport agreements and sought to be released of the same and had sought for consent to dispose of the mixer-trucks he had bought (see exh D6 BOD C p 75 and exh D6 BOD C p 76) which meant that he understood what arrangement he had entered into with the defendants;

(c) during the inquiry on 21 October 2016 into his misconduct (exh D8 BOD F pp 418–420), he said that he had been with the defendants since 2007, that he was happy and no issue was taken that he was kept out of any agreements which meant that his unhappiness was only because the business arrangements were terminated;

(d) during the existence of the business arrangement, he was content with the manner in which his fees for the deliveries he made were calculated and accounted to him as reflected in the numerous payment advices and invoices produced by he himself in court (exh P28A to P29 ABT BOD D and F pp 97–340) and the court noted that the invoices which were in English for his two mixer-trucks WEF 5801 and WYX 9397 were raised by the plaintiff himself carrying his signature and spanning a period from 2013 until 2016 depicting the volume of deliveries and incentives claimed which led the court to conclude that the plaintiff is no hillbilly but one who was able to manage two-mixer trucks carrying RmC interstate, whenever necessary, and the accounts of his business; and

(e) the court accepted the evidence of SD2 and SD5 that the contents of the two transport agreements (DOS) were in fact explained to the plaintiff in Bahasa Malaysia before they were signed and copies given to the

plaintiff on the day of their execution (NOP of evidence of SD2 on 10 December 2020 pp 416, 418–419 and 440 and of SD5 at pp 499–500).

[44] Further, from the evidence led from SD2 and SD5, contrary to what was alleged by the plaintiff, copies of both the transport agreements (exh P1 and exh P3) were in fact given to the plaintiff together with the letters of authorization signed by the plaintiff (exhs D30 and D31 found in BOD F pp 358–376 respectively) authorising D1 to deduct on a monthly basis from the billing due to him for payments which he was to be liable namely repayments of the purchase of the chassis, repair and maintenance, RIMV Inspection fees, insurance premium, road tax, carrier licence fees, traffic compound/fine/summons and driver's remuneration.

[45] SD2 and SD5 also testified that at the same time, the two letters from D1 (exhs D40 and D41 found in BOD F pp 402 and 407 respectively) issued to Usaha Kati Enterprise signed by SD5 were given to the plaintiff (NOP of 10 December 2020 pp 499–500) informing him that D2 was authorised to act for D1 in the management of the transport agreements (DOS).

Fraud

[46] The plaintiff pleaded fraud in para 52 of his amended statement of claim. Various particulars pleaded which have been addressed above are he not understanding the transport agreements (DOS) which were in English, the omission to supply the transport agreements (DOS) and that the defendants having no authority to deduct payments due to him.

[47] Before going further to deal with the other allegations of fraud, it would be useful to set out what is fraud.

[48] Section 17 of the Contracts Act 1950 (Revised 1974) defines 'fraud' as including any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge or belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

[49] And, it is set out as an explanation note to s 415 of the Penal Code on cheating, that a mere breach of contract is not itself proof of an original fraudulent intent. For the avoidance of any doubt, this is not to suggest that there was any breach of contract by the defendants.

[50] No attempt whatsoever was made by learned counsel for the plaintiff to at least make reference to the provisions of s 17 of the Contracts Act 1950 above and to show how the plaintiff had been defrauded.

[51] It would have been most helpful if learned counsel can tie up the evidence with the law to support the pleaded case so as to assist the court to arrive at the conclusion wanted instead of throwing allegations and making the court sieve through the evidence and apply the law against the backdrop of the pleaded case so as to arrive at a decision.

Forgery of signature

[52] The plaintiff pleaded that his signature on the transport agreement (DOS) (exh D5 BOD F pp 377–388) dated 25 April 2016 had been forged. He alleged that his signature had been superimposed onto the agreement by way of a photocopy. During trial, he sought for the original copy to be produced for inspection. The original copy was produced by the defendants.

[53] Then, instead of having the issue resolved in this proceedings, whilst he was under cross-examination, the plaintiff made a police report (exh P34 dated 5 September 2019) to allege that his signature was forged. This raised a howl of protest by learned counsel for the defendants (NOP of 5 September 2019 pp 58–61) that it amounts to interference with due process of court.

[54] On the strength of his aforesaid police report, learned counsel for the plaintiff called upon this court to draw an adverse inference pursuant to s 114(g) of the Evidence Act 1950 against the defendants that his complaint must be deemed true because the defendants did not file any police report to rebut his police report.

[55] In my view, it is open to anyone to lodge a police report if he is of the view that an offence has been committed. As a matter of common sense, if a criminal offence took place in court for eg that of voluntarily causing grievous hurt to extort confession or to compel restoration of property (s 331 of the Penal Code) or voluntarily causing hurt on provocation (s 334 of the Penal Code) it is no less a crime just because proceedings are on foot although no doubt, it may also amount to contempt of court for interfering with the due administration of justice.

A **[56]** Such a police report is known as a first information report. It is meant to trigger an investigation under criminal law. It is a public document. And sub-s 107(4) of the Criminal Procedure Code provides that a police officer shall be duty bound to receive any information in relation to any offence committed anywhere in Malaysia and this would include a court.

B

[57] However, what is the evidential value of such a report?

[58] I do not agree with the submissions by learned counsel for the plaintiff that just because there has been no police report lodged in rebuttal, an adverse C inference is to be drawn and the statements contained in the plaintiff's police report (exh P34) are to be accepted as true. It is not a substantive piece of evidence (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC) and *Tan Cheng Kooi & Anor v Public Prosecutor* [1972] 2 MLJ D 115; [1972] 1 LNS 146 (HC).

[59] That said, there is, however, the provision of sub-s 73A(3) of the Evidence Act 1950 on admissibility of documentary evidence in civil cases which expressly provides that:

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> Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

F **[60]** On a plain reading, sub-s 73A(3) of the Evidence Act 1950 would prohibit the admissibility of the police report (exh 34) as it was a statement made by the plaintiff who undoubtedly was a person interested at a time when proceedings were pending involving a dispute as to whether his signature had been forged on the transport agreement (DOS) dated 25 April 2016 (exh D5).

G

[61] However, this court bore in mind that a body of case law has developed in Malaysia which gives much weight *in civil cases* to whether a contemporaneous police report was made when any allegation of criminal wrongdoing such as fraud or forgery was made. In *Floral Trends Limited v Li* H *Onn Floral Enterprise (M) Sdn Bhd and Anor* [2006] MLJU 339; [2006] 6 CLJ 525, the second defendant claimed that his signature on the letter of guarantee was forged and the High Court held that it is a criminal wrong to forge a document and bereft of a police report, the allegation of the second defendant must be construed as a bare allegation. In *David Wong Hon Leong v Noorazman* I *bin Adnan* [1995] 4 CLJ 155 the appellant failed to timeously lodge a police report and Gopal Sri Ram JCA speaking for the Court of Appeal upheld the approach of the learned High Court judge in giving no weight to the police report on bribery. Similarly in *Chong Wan Ping & Anor v Shamshudeen Hj Mohd Yunus* [2009] MLJU 897; [2009] 1 LNS 834 the High Court held that

for an allegation of fraud in a civil proceeding, it must be shown that a contemporaneous police report had been lodged, otherwise the allegations are merely bare allegations. In the recent Court of Appeal case of *Bank Kerjasama Rakyat Malaysia Bhd v Chong Voon Chung* [2021] MLJU 359; [2021] 1 LNS 250, a delay of some 16 months in lodging a police report by the litigant alleging that his signature on a joint and several guarantee was forged was adversely held against him. And, the Court of Appeal found that the reason advanced for the delay that he left the matter to his lawyers to be incredible. These cases would by necessary implication establish that a police report lodged by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish would be admissible.

[62] It is, however, to be observed that in none of the aforesaid cases on having to lodge a contemporaneous police report was the provision of sub-s 73A(3) of the Evidence Act discussed. In *Merck Sharp & Dohme Group & Anor v Hovid Bhd* [2019] MLJU 918; [2019] 9 CLJ 1 the Federal Court held that:

> [106] It is established in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 that the Court of Appeal may depart from its own previous decisions in the following situations:
>
> (i) where the court is faced with two conflicting decisions of its own, it may choose which one to follow;
>
> (ii) the court is not bound to follow one of its own previous decisions which is inconsistent with a later House of Lords' decision; and
>
> (iii) the court is not bound to follow a decision of its own which was given *per incuriam.*

[63] In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 at pp 12–13; [1997] 4 CLJ 645 at p 660, Peh Swee Chin FCJ stated:

> A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per *Sir Raymond Evershed MR in Morelle v Wakeling* [1955] 2 QB 379 at p 406 as a '*decision given in ignorance or forgetfulness of some inconsistent statutory provision* or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of Morelle's case is 1955 whereas our s 3 of the Civil Law Act was enacted in 1956. The ratio in Morelle's case is also part of the common law applicable to us. (Emphasis added.)

[64] In *Cassel & Co v Broome* [1972] AC 1027 at p 1054 the House of Lords held that courts in the lower tiers below the Court of Appeal could not rely on

the per incuriam rule applied by the Court of Appeal for itself. See also *Mohd Sabri bin Mohamad Zin v Dr M Nachiappan & Anor* [2017] MLJU 2443 at para [30]. However, in *Abu Bakar Ismail & Anor v Ismail Husin & Ors & other Appeals* [2007] 3 CLJ 97, Gopal Sri Ram JCA (as he then was) quoted with approval the following extract from *Sir John Salmond's Treatise on Jurisprudence* (12th Ed) at pp 151–152:

> A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v LCC* [1898] AC 375) and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court (*Young v Bristol Aeroplane Co Ltd* (194) KR at 729 (CA)) The rule apparently applies even though the earlier Court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. *Even a lower Court can impugn a precedent on such grounds.* (Emphasis added by Gopal Sri Ram JCA.)

[65] If the plaintiff's police report was inadmissible on the premise of the provisions of sub-s 73A Evidence Act, the asserted adverse inference to be drawn by reason of the defendants not having lodged a police report in rebuttal will be a non-issue.

[66] However, learned counsel for the defendants agreed to the police report to be admitted and it was duly marked as exh P34.

[67] Therefore, it would be helpful if the Federal Court or the Court of Appeal were to deliberate on whether a police report lodged by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish would be admissible in civil cases in view of s 73A of the Evidence Act. Until then, premised upon the agreement by the defendants and I would add, the provisions of ss 74–78A of the Evidence Act which provide that a public document is admissible, I had ruled that the police report lodged by the plaintiff was admissible and it was, as mentioned earlier, marked as exh P34.

[68] However, admissibility is one thing and probative value is another. Therefore, although I had allowed the plaintiff's police report (ID 34) to be admitted (encl 41 NOP p 68 lines 20–30) I had expressly ruled that the probative value of the evidence, in this case, the transport agreement (DOS) (D5) and the police report (exh P34) was for the court to decide at the end of

the day and exh ID34 was subsequently marked as exh P34 (NOP of 8 October 2020 at p 71) with learned counsel for the defendants reserving his rights to dispute its contents.

[69] The plaintiff gave evidence in court via his witness statement (PWS 1(A) para 8) saying that the signature on D5 purporting to be his was forged.

[70] This court proceeded to analyse the evidence to see whether the plaintiff has discharged the legal burden cast upon him to prove that it was forged. In this regard, under cross-examination when referred to D35 (BOD F at p 387) he *admitted* that he signed it. (NOP of 8 October 2020 p 75 lines 6–9 and p 76:

> PD Saya pendekkan soalan itu., di bawah tandatangan nama Ismail Hashim dan nombor kad pengenalan adalah diturunkan oleh En Ismail sendiri, setuju tidak setuju
>
> SP1 Setuju

[71] The plaintiff was then referred to his earlier testimony under cross-examination (NOP of 5 September 2019 p 78) where the following evidence was led from him:

> MYA ... Dan original agreementyang ada di hadapan sekarang Encik, di mana soalan saya lagi, kamu dah jawab taka ada supeimpose, ya? Setuju?
>
> Ismail Ya
>
> MYA Witness agree no superimpose. Awak sain dokumen ini?
>
> Ismail Ya, saya sain.
>
> MYA You sign?
>
> Ismail Ya

[72] When asked to confirm that he had in fact earlier admitted that he signed it, he changed his position and said 'Saya ragu-ragu Yang Arif' and when pressed with 'Ragu-ragu keterangan sendiri?', he replied 'Ya'.

[73] This court observed that the impugned signature is in the document which has been included in Part C of the Common Bundle of Document (Bundle F pp 377–388) and filed as court encl 15 on 18 April 2019. This suggests that the parties would have exchanged documents much earlier and in fact, the plaintiff made mention of him not having signed such a document in para 18 of his amended statement of claim filed on 8 2019 (encl 16 Bundle A p 9) alleging that he was shocked to come to know of such a document on 27 December 2018. With the plaintiff lodging his police report (exh P34) alleging forgery of his signature on 5 September 2019 some nine months later,

based upon by the Court of Appeal authorities of *David Wong Hon Leong* and *Bank Kerjasama Rakyat Malaysia Bhd* cited above, such an allegation is bereft of any weight.

[74] This court was aware of the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 cited by learned counsel for the plaintiff that absent a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. However, in view of the evidence led and the materials before the court as well as the case authorities cited above, I decided that the plaintiff had admitted that it was his signature and in any event, even if there was no such admission, he had failed to prove that the signature said to be his on exh D5 was forged. His belated attempt to say he was uncertain about the evidence or admission he had given lacked any credibility. Wherefore, his assertions and submissions in writing both primary and reply (encl 49 paras 20–22 and encl 61 para 21) that his signature on D5 was a forgery was devoid of merits.

No right to sell the mixer-trucks and breach of the hire-purchase act/illegality

[75] The plaintiff asserted that D1 did not have the right to sell the mixer-truck (WEF 5801) to the plaintiff as it was registered under MSE Construction Sdn Bhd.

[76] Reliance was placed by the plaintiff on the provisions of s 24(e) of the Contracts Act 1950 that the consideration or object of an agreement is lawful unless the court regards it as immoral or opposed to public policy and an excerpt from Pollock and Mulla on public policy and the cases of *Pang Mun Chung v Cheong Huey Charn* [2018] 4 MLJ 594; [2018] 8 CLJ 663 and *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 (FC) for the principle that if the agreement is a sham and amounts to an illegality although not pleaded, it could not be ignored.

[77] Learned counsel for the plaintiff then referred to s 38 of the Hire Purchase Act 1967 which provides that any fraudulent sale or disposal of goods shall upon conviction be liable to a fine or to imprisonment or to both.

[78] However, as pointed out by learned counsel for the defendants, the two mixer-trucks were not subject to the list of goods in the First Schedule of the Hire Purchase Act 1967 and by reason thereto the Hire Purchase Act did not apply and this section that learned counsel sought to rely upon was a non-starter.

[79] Nevertheless, the court proceeded to analyse the evidence as to whether it was a fact that D1 was not able to pass a good title to the plaintiff for the two mixer-trucks that it had sold to the plaintiff.

[80] There was evidence from SD5 (NOP Vol 4 pp 472–473) that D1 had bought WEF 5801 from Winshire Corp, who in turn had purchased it from another entity named MSE Construction. What was important was that D1 was in a position to give good title to the plaintiff once the plaintiff had effected full payment. Documentary evidence in exhs D6 and D7 show that by letters dated 28 October 20216, the plaintiff had no issue in seeking the permission of D1 to sell his mixer-truck WEF 5801 and to have his other mixer-truck WYX 9397 transferred. He obtained consent for both as could be seen when under cross-examination, the plaintiff admitted that vehicle WEF 5801 was transferred to him and he had sold it to a third party by the name of Murli (see NOP of 5 September 2020 p 82) after having had the use of it for almost six years and as for vehicle WYX 9397, the transport agreement (DOS) for the sale of this mixer-truck was transferred or novated to his friend and former employer, Mohd Hasrul bin Mohd Sapuan (SD4).

[81] Under cross-examination (NOP Vol 4 p 473) SD5 also made it clear that when D1 sold the mixer-truck to the plaintiff's business entity, Usaha Kati Enterprise, there was no undue profiteering as was suggested because D1 had to upgrade the condition of the mixer-truck and in the case of mixer-truck WEF 5801, D1 bought it for RM78,000, spent RM33,000 to upgrade it before selling it to Usaha Kati Enterprise for RM111,636 and thus made only a small profit of RM636. Whereas, for mixer-truck WYX 9397, D1 bought it for RM175,000 (NOP Vol 4 p 492 and exh D53 BOD F p 405) from Chin Soon Machinery Sdn Bhd. (exh D53 BOD F p 405) and sold it to the plaintiff vide the second transport agreement (DOS) (exh P3 BOD F p 359 @ p 374) for RM248,500. SD5 testified during re-examination (NOP Vol 4 p 505) that D1 made a loss of RM7,000 because it had to spend RM51,000 to repair it making its cost to be RM226,100 and when the bank interest at 3.5% (exh P39 BOD C pp 32–54 and BOD F p 410) to a sum of RM29,400 is added, the total cost for D1 for vehicle WYX 9397 came to RM255,500 but was sold to the plaintiff at only RM248,500 resulting in a loss of RM7,000.

Levy of 6% GST

[82] We now come to the issue of the 6% GST where the plaintiff had pleaded in paras 52(j) and (k) of his amended statement of claim that the defendants were alleged to have unlawfully imposed upon him. This claim turned out to be a red herring.

[83] During the trial, it was made clear that if the plaintiff had purchased diesel from any of the petrol stations directly, he would not have to pay any GST simply because petrol stations are exempted under s 56(3)(b) of the Goods and Services Tax Act 2014. SD 5 clarified that the plaintiff, however, chose to use the defendants' companies Shell credit card to purchase fuel which saw GST being imposed and the defendants then passed on these charges to the plaintiff. Despite being advised, the plaintiff, however, did not listen and continued to purchase fuel using the defendants' credit card. (NOP of 5 January 2021 pp 500–501).

[84] The plaintiff was also advised that he could go over to the Royal Customs Department to claim back his GST but no evidence was led or proffered as to why he did not. To then lay this claim upon the defendants was wholly devoid of merits.

[85] For the 6% GST levied for the use of the GPS monitor on the mixer-trucks, there was nary a complaint raised throughout his business relationship with the defendants and to only raise it in the action herein smacks of a clear afterthought. In any event, during cross-examination, the plaintiff admitted that it was a requirement by Suruhanjaya Pengangkutan Awam Darat that such an apparatus had to be affixed to the vehicles (NOP of 6 September 2019 p 142 lines 32–37 and p 143 lines 2–5). Similarly, for the GST on the insurance premium paid for insurance coverage, it was taken for his benefit and for which there was no exemption (see encl 59 para 55).

Monthly deductions

[86] Under the two transport agreements (DOS) the plaintiff was obliged to keep the mixer-trucks in good repair and in a road-worthy condition at his own costs. As alluded to earlier (see paras [44]–[45] above), as per the letters signed by the plaintiff (exhs D30 and D31), the plaintiff irrevocably authorised D1 to pay the outgoings required for the maintenance under the two transport agreements (DOS) and by way of two separate letters (exh D40 and D41) to the plaintiff's business entity, Usaha Kati Enterprise, D2 was the authorised agent of D1 in managing the two transport agreements.

[87] Having held that the plaintiff was not engaged under a contract of service but one of contract for services, the expenses incurred by the defendants for the benefit of the plaintiff could rightfully be deducted against the earnings of the plaintiff.

[88] In the circumstances, the plaintiff's claim to be reimbursed for the deductions was devoid of merits, more so, when these deductions which have been regularly done in the past years since the first transport agreement was

made in 2010, were only sought to be challenged for the first time by way of this suit in 2018, after the contracts for his services were terminated in 2016. Further, in my view the assertions by learned counsel for the defendants that the plaintiff would in the circumstances be estopped from challenging such deductions were well founded. The defence of estoppel raised by the plaintiffs will be addressed in greater detail below.

Whether the plaintiff ought to be allowed a refund of RM101,166.56 for what he has paid for WYX 9397

[89] In para 52(h) of his amended statement of claim (Bundle A encl 16 p 16), the plaintiff claimed for the return of the monthly payments made for 'Lori' WYX 9397 when this mixer-truck was taken by the defendants and used for the benefit of the defendants.

[90] The defendants in their Defence (Bundle A encl 16 p 33 para 45) denied the claim and averred that upon the plaintiff's request, D1 had transferred the [Second] Transport Agreement (DOS) to Mohd Hasrul Bin Mohd Sapuan trading as Harapan Jitu Enterprise on 28 October 2016 (exh D35 BOD F pp 427–440).

[91] Learned counsel for the plaintiff had in his primary written submissions (encl 49 paras 38–39) and repeated in his written submissions in reply (encl 61 para 31) submitted that this court should order the defendants to refund a sum of RM101,166.56 which is made up of the total of the monthly instalments of RM96,166.56 plus RM5,000 being the deposit paid for the mixer-truck WYX 9397.

[92] Reference was made by learned counsel for the plaintiff to SD2's testimony (NOP Vol 4 p 425) where he admitted that the plaintiff had paid the sum of RM102,078.22 and as for the following question (NOP p 426) he impliedly agreed with counsel that the vehicle WYX was transferred to another party.

[93] In both their primary written submissions (encl 59 paras 70–76 and submissions in reply (encl 54 para 15 to 18), the defendants submitted that at the request of the plaintiff made in writing (exh D7 BOD C p 76) the second transport agreement (DOS) was transferred to Mohd Hasrul bin Mohd Sapuan, SD4. The legal effect of that was that the second transport agreement (DOS) between D1 and D2 need not be performed. Section 63 of the Contracts Act 1950 (Revised 1974) expressly provides that:

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
>
> ILLUSTRATIONS

A (a) A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B RM10,000. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for RM5,000 in place of the debt of RM10,000. This is a new contract and extinguishes the old.

B

(c) A owes B RM1,000 under a contract. B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the agreement. B still owes C RM1,000, and no new contract has been entered into.

C

[94] Thus, to use the words of the defendants, the plaintiff had waived whatever rights he had and whatever rights, if any, he may have should lie against Mohd Hasrul bin Mohd Sapuan.

D

[95] SD2 had in his witness statement (DWS2 at Q&A 17) averred that the plaintiff breached the transport agreement (DOS) for vehicle No WYX 9397 when he hit a pregnant staff and D1 agreed to transfer the mixer-truck to the plaintiff's friend but unfortunately the friend failed to turn up for deliveries leading to warning letters and subsequent termination. He averred that the plaintiff is not entitled to this claim because the plaintiff had agreed to the deductions made for the expenses incurred before receiving payments. By this, this court understood him as saying that whatever monthly instalments paid by the plaintiff had been set off against the permissible deductions as agreed by the plaintiff and there was nothing due to be refunded to the plaintiff.

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[96] The plaintiff's friend was Mohd Hasrul bin Mohd Sapuan, SD4, a witness who was subpoenaed to attend court. He gave an interesting testimony to the effect that he was in fact the proxy for the plaintiff under the new transport agreement (exh D35 BOD F pp 427–438) using a business entity named Harapan Jitu Enterprise (DWS 4 Q&A 5) and he was remitting payments into the plaintiff's RHB account from December 2016 until November 2017 (DWS 4 Q&A 7 and 8). To the credit of this witness, he was calm and composed throughout his testimony which was consistent.

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[97] Taking the evidence led on this claim, the court agreed with the defendants that with the contract having been transferred or novated to SD4 (exh D35) at the request of the plaintiff (exh D7) whatever rights that the plaintiff would have is for him to look towards SD4. However, it is to be noted that SD4's testimony was to the effect that the new contract (exh D35) could not be performed mainly because of the plaintiff who was not able to secure a driver for the mixer-truck (see NOP encl 41 p 209). Wherefore, this claim failed.

I

Whether the plaintiff is estopped from pursuing his claims

[98] In paras 35–37 of their amended defence (Bundle A encl 16 pp 31–32) the defendants pleaded that the plaintiffs had promised that he would have no claims against the defendants (exh D 32 BOD C p 88) in consideration of the following:

(a) that the defendants grant the plaintiff a loan of RM16,000 plus the withdrawal of RM4,000 retention money to assist in maintaining mixer-truck WEF 5801;

(b) that the plaintiff was to enter into a two year delivery contract and to pay the instalments which was done by an agreement dated 25 October 2016;

(c) that, however, the plaintiff later sought consent to sell WEF 5801 as the contract for this mixer-truck was terminated by reason of his misconduct and he promised to pay back all dues (exh D6 BOD C p 75);

(d) that despite his misconduct, the defendants by letter dated 21 November 2016 agreed and did transfer the name on the title of WEF 5801 to the plaintiff and delivered the mixer-truck to the plaintiff who disposed of the same; and

(e) that the second transport agreement (DOS) involving WYX 9397 was transferred to Mohd Hasrul bin Mohd Sapuan trading as Harapan Jitu Enterprise on 28 October 2016 at the request of the plaintiff (exh D7 BOD C p 76).

[99] From the narrative that had been set out earlier, evidence of due compliance by the defendants of their obligations under the settlement have been produced which saw the plaintiff being able to sell mixer-truck WEF 5801 (NOP of the plaintiff's testimony under XE on 15 September 2020 at p 82) and the second transport agreement (DOS) being transferred to the plaintiff's friend and former employer, Mohd Hasrul bin Mohd Sapuan (SD4) (exh P19 BOD p 77 and exh D35).

[100] The settlement arrived at was documented in Bahasa Malaysia and can be seen in exh D32 (BOD C p 88) where the plaintiff was documented as saying that he has received the mixer-truck and grant/certificate of title for vehicle WEF 5801 (chassis number CW53H-05400 and engine number RE8-112010) and in its original language states as follows:

> Saya Ismail Hashim (No KP 730730-08-6243) dengan ini menerima lori mixer dan geran/sijil pemilikan kenderaan WEF 5801 (nombor casis CW53H-05400 dan nombor enjin RE8-112010 daripada syarikat Inno Concrete Technologies Sdn Bhd. Saya berjanji tidak akan menuntut apa-apa lagi selepas ini.

Nama: Ismail Hashim Tandatangan : Signed

No. Kad pengenalan: 730730-08-6243 Tarikh: 21//11/16

USAHA KATI ENTERPRISE (IP 0456488-D)

No. 16 Laluan Klebang Jaya 32

Taman Klebang Jaya

31200 Chemor, Perak

H/P 012-5468780

[101] In *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd* [2018] MLJU 217; [2018] 1 LNS 145 Lee Swee Seng J (now JCA) said:

[62] I agree with the Respondent that a defence of waiver is a valid defence to a claim in contract. In *W J Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 ('WJ Alan'), Lord Denning MR held:

> The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so - see *Plasticmoda Soc per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyd 527, 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them'.

[63] The above principle in *W J Alan* was endorsed by the Court of Appeal in *Puncak Alam Housing Sdn Bhd v Menta Construction Sdn Bhd & Anor* [2013] 1 LNS 148.

[64] Learned counsel for the Respondent also referred to the case of *Anthony Lawrence Bourke & Anor v CIMB Bank Bhd* [2017] MLJU 771; [2017] 10 CLJ 167, where the Court held that:

> [30] Having made its election to waive the DED and by continuing to disburse on the Agreement, the Respondent bank ought not to be allowed to take an absolutely opposite position in defence of its action. In our view this is a classic case of a waiver by conduct as decided in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 311; [1995] 4 CLJ 283. It was observed by the Federal Court through the judgment of Gopal Sri Ram JCA (as His Lordship then was) at page 348 of the judgment that when payment was made on the invoices without protest in that case, a reasonable man in similar circumstanced would be entitled to assume that the there was no complaint on the same. Similarly, the Appellants here would be entitled to assume that the Respondent bank had waived its right under Clause 3.4 of the Loan Agreement after DED, by its conduct. *It would be most unjust for the Respondent to now suggest that, alter paying four invoices, it can go back to Clause 3.4 to enforce its original right that it had at least on four occasions,*

waived. (Emphasis added by Lee Swee Seng J (now JCA).)

[102] To my mind, with the plaintiff having secured the full benefit under the first transport agreement (DOS) regarding vehicle WEF 5801 coupled with the waiver he had executed in writing and with the second transport agreement (DOS) regarding WYX 9397 having been novated in favour of his nominated party cum friend and former employer, Mohd Hasrul bin Mohd Sapuan (SP4) at his request, the plaintiff ought to be and this Court so held that he was estopped from claiming for whatever rights, if any, that still may be under the two transport agreements (DOS).

GENERAL OBSERVATIONS

[103] On the complaint by learned counsel for the plaintiff that several parts in the witness statements of both SD5 and SD2 were identical, I accept that as a general rule this will heighten the suspicion of the court but both SD2 and SD5 were able to answer clearly, questions which were put to them in turn by the learned counsel for the plaintiff under rigorous cross-examination and, on the totality of the evidence given, they did not give me the impression that they had come to court to mislead the court in any way. The reason given by SD5 for the similarity in answers was that after the incident on 18 October 2016 when the plaintiff assaulted SD3, he, as a common director of both the defendants and SD2, the general manager of both the defendants had discussions on how to go about the case (NOP Vol 4 under XE pp 461–462 and under Re-X pp 493–494) and I find this to be reasonable and acceptable as the incident had an effect on the operations of the company with suggestions put up after the inquiry on how to manage the contractors in future (BOD F pp 411–412).

[104] The video in exh D33 clearly show the incident of the plaintiff assaulting and punching the female staff (SD3), who was called to testify to relive her harrowing experience (DWS 3A and DWS 3B and exh D47) and it is reasonable for the defendants to take the action that they did to bring the relationship they had with the plaintiff to an end by way of termination. A contemporaneous police report (exh D43) describing the assault by the plaintiff was also lodged by the victim (SD3).

[105] This case illustrates well how a moment of indulgence in anger and violence can lead to adverse repercussions rippling through a myriad of people and the courts with stacks of documents to be perused and analysed. However, from the evidence led, the case theory advanced by the plaintiff that everyone from the person he assaulted (SD3) through to the director (SD5) including the manager (SD1) and his friend and former employer (SD4) having conspired to do him in is wholly devoid of merits.

A CONCLUSION

[106] In the upshot, the plaintiff's claims were dismissed with costs.

Plaintiff's claim dismissed with costs.

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Reported by Dzulqarnain Ab Fatar

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